(18,576.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Petition for writ of error	*a*	1
Writ of error	*c*	2
Citation	*e*	3
Acceptance of service of citation	*f*	3
Bond on writ of error	*g*	3
Assignment of errors in Supreme Court of the United States	*j*	5
Assignment of errors in supreme court of Minnesota	*o*	9
Transcript from district court of Traverse county	01	12
Complaint	01	12
Answer	1	12
Application of John Ireland	7	16
Affidavit in support of application	8	16
Notice of intention to make proof, &c	10	17
Testimony of John Ireland	13	19
Agreement, St. P., M. & M. R'y Co. and John Ireland, July 17, 1880	14	19
Further testimony of John Ireland	17	22
Exhibit C—Graceville colony, second contract	19	22
Further testimony of John Ireland	21	24
Exhibit D—Deed, John Ireland to St. P., M. & M. R'y Co., October 25, 1891	24	25
Exhibit E—Letter, Bookwalter to Ireland, March 28, 1889	25	26
Further testimony of John Ireland	26	27

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1903.

	Original.	Print
Exhibit F—Agreement, John Ireland and R. S. Tyler, December 30, 1889	29	29
Exhibit G—Letter, Ireland to Hill, March 14, 1894	33	31
Further testimony of John Ireland	34	32
Testimony of James Stoddard	36	33
Testimony of John P. O'Connor	38	34
Stockslager & Heard's Exhibit A—Stipulation between Babbit and Stockslager and Heard, January 21, 1897	45	38
Decision of Commissioner General Land Office, Feb. 3, 1898	52	42
Decisions of Secretary of Interior, January 20 and 23, 1899	71	53
Decision of Secretary of Interior, April 24, 1899	73	54
Reply	89	62
Case containing exceptions	95	65
Exhibit Z—Stipulation of facts	95	66
Testimony of John Ireland	102	69
Exhibit C—Graceville colony, second contract	104	71
Further testimony of John Ireland	107	72
Exhibit D—(Not set out here—See side page 24)	110	74
Exhibit E—(Not set out here—See side page 25)	111	74
Further testimony of John Ireland	111	74
Exhibit F—(Not set out here—See side page 29)	114	76
Exhibit G—(Not set out here—See side page 33)	115	76
Further testimony of John Ireland	116	76
Testimony of James Stoddard	118	77
John P. O'Connor	120	78
Stockslager and Heard Exhibit A—Stipulation	127	82
Exhibit A—Letter, Commissioner to register and receiver, May 25, 1869	142	89
B—Decision, St. Paul & Sioux City R. R. Co. *et al.*	143	90
C—Letter, Commissioner to register and receiver, May 28, 1891	150	93
D—Letter, Secretary to Commissioner, March 21, 1894	152	95
E—Letter, Secretary to Commissioner, Oct. 1, 1895	155	96
F—Letter, Commissioner to Thos. R. Benton, January 13, 1896	157	97
H—Letter, Commissioner to register and receiver, July 10, 1896	158	98
H[1]—Letter, Commissioner to register and receiver, July 17, 1896	162	100
I—Letter, Commissioner to register and receiver, October 23, 1896	165	101
II—Letter, Commissioner to register and receiver, October 23, 1896	166	101
J—Application of John Ireland	167	102
K—Letter, Commissioner to register and receiver, October 24, 1896	168	102
K[1]—Letter, Commissioner to register and receiver, October 24, 1896	171	104
L—Certificate of register of filing papers of Gertgens	172	105
O—Notice of intention to make proof	173	105

	Original.	Print
Exhibit O[1]—Patent to Ireland	176	107
R—Agreement, Ireland and O'Connor, March 3, 1898	178	108
Findings and decision	181	109
Opinion	183	110
Order settling case containing exceptions	188	113
Judgment	189	113
Notice of appeal	190	113
Syllabus	191	114
Opinion	194	115
Petition for rehearing	219	127
Order denying rehearing	236	136
Judgment	238	137
Order for judgment	240	138
Minute entry of argument and submission	242	138
Clerk's certificate	245	139

a STATE OF MINNESOTA :

Supreme Court.

JOHN P. O'CONNOR, Plaintiff and Respondent,
vs.
JACOB GERTGENS, Defendant and Appellant.

To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota :

Now comes Jacob Gertgens, defendant in the above-entitled cause, and complains that in the records and proceedings and also in the rendition of judgment in a suit between said complainant as defendant and John P. O'Connor as plaintiff, in the supreme court of the State of Minnesota, it being the highest court of law or equity of said State in which a decision in the suit could be had, in which a decision and final judgment was rendered against said defendant in said suit on the 25th. day of April, 1902, affirming the judgment of the district court of said State of Minnesota against said defendant in favor of said plaintiff, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Minnesota in this :

That said defendant claimed a title, right, privilege and immunity under the Constitution, treaty, statute of, commission held and authority exercised under, the United States and the decision was against the title, right, privilege, and immunity especially set up or claimed by said defendant under such Constitution, treaty, statute, commission and authority.

Said decision denies defendant a right given by a statute of
b the United States known as the homestead law of the United States.

Denies defendant the right to secure title to a portion of the public lands of the United States under said homestead laws and also under the second proviso of the 5th. section of the act of Congress passed and approved March 3rd. 1887.

That said judgment of said court is a final judgment.

Wherefore said defendant in said suit prays for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

S. M. STOCKSLAGER,
GEO. C. HEARD,
F. W. MURPHY,
Attorneys for Defendant.

THOMAS KNEELAND AND
L. C. SPOONER,
Of Counsel.

Allowed :
CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

St. Paul, Minnesota, 19th. May, 1902.

[Endorsed:] 12757 Copy State of Minnesota supreme court. John P. O'Connor, pl'ff & resp., *vs.* Jacob Gertgens, def't & appellant Petition by defendant for writ of error.
(Endorsed:) Filed May 10, 1902 D. F. Reese clerk.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Minnesota, before you or some of you being the highest court of law or equity of said State in which a decision could be had, in the suit between John P. O'Connor, as plaintiff, and Jacob Gertgens as defendant, wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or exemption especially set up or claimed under such clause of the said Constitution, treaty, statute commission or authority; a manifest error hath happened to the great damage of said Jacob Gertgens, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days of the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of May, A. D. 1902.

{ U. S. Circuit Court Seal, Dist. of Minnesota, Thirn Division. (Court Seal.) }

HENRY D. LANG,
Clerk of the Circuit Court of the United States in and for the District of Minnesota.

Allowed this 19th day of May 1902
CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

d [Endorsed:] Original Supreme court, State of Minnesota. John P. O'Connor, plaintiff, *vs.* Jacob Gertgens, defendant. Writ of error.

e UNITED STATES OF AMERICA, *ss:*

To John P. O'Connor and E. T. Young and Stevens, O'Brien, Cole & Albrecht, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days of the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Jacob Gertgens is plaintiff in error and you, the said John P. O'Connor, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 19 day of May in the year of our Lord, one thousand nine hundred and two.

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

f [Endorsed:] Supreme court, Jacob Gertgens, plaintiff in error, *vs.* John P. O'Connor, defendant in error. Citation. Due service of within citation admitted this 19th May 1902. E. T. Young, by H. F. Stevens, Stevens, O'Brien, Cole & Albrecht, attorneys for John P. O'Connor def't in error.

g Supreme Court of the United States, *ss:*

JACOB GERTGENS, Plaintiff in Error,
vs.
JOHN P. O'CONNER, Defendant in Error.

Know all men by these presents, that we, Jacob Gertgens, plaintiff in error, as principal, and August Rixe and Henry Gangelhoff as sureties, both of Johnson, Traverse county, Minnesota, are held and firmly bound unto said John P. O'Conner, defendant in error, in the sum of one thousand dollars ($1,000.00) to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 12th day of May, 1902.

Whereas, the above-named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota, against said plaintiff in error and in favor of the defendant in error.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make

good his plea, then this obligation shall be void; otherwise, to remain in full force and effect.

JACOB GERTGENS. [SEAL.]
AUGUST RIXE. [SEAL.]
HENRY GANGELHOFF. [SEAL.]

Signed, sealed and delivered in presence of—

F. W. MURPHY.
G. L. H. TUCKER.

h STATE OF MINNESOTA, } ss:
County of Traverse, }

On this 12th. day of May, 1902, before me, a notary public within and for said county, personally appeared Jacob Gertgens, whose post-office address is Graceville, Minnesota, and August Rixe and Henry Gangelhoff, whose post office address is Johnson, Minnesota, to me personally known to be the persons described in and who executed the foregoing bond, and each acknowledged that he executed the same freely and voluntarily as his free act and deed.

[NOTARIAL SEAL.] F. W. MURPHY,
Notary Public, Minnesota.

STATE OF MINNESOTA, } ss:
County of Traverse, }

August Rixe and Henry Gangelhoff, both of Johnson, Minnesota the sureties named in and who executed the foregoing bond, being first duly sworn, doth, each for himself, depose and say: That he is a resident and freeholder of Traverse county, State of Minnesota and worth the amount of one thousand dollars ($1000.00), above his debts and liabilities and exclusive of his property exempt from execution.

AUGUST RIXE. [SEAL.]
HENRY GANGELHOFF. [SEAL.]

Subscribed and sworn to before me this 12th. day of May, 1902.

[NOTARIAL SEAL.] F. W. MURPHY,
Notary Public, Minnesota.

i [Endorsed:] 12757. Copy Supreme Court of the United States. Jacob Gertgens, pl'ff in error, *vs.* John P. O'Connor, def't in error. Bond in appeal. The within bond and the sureties thereon are hereby approved this 19th day of May 1902 Chas. M. Start, chief justice of the supreme court of Minnesota.
Endorsed: Filed May 19, 1902. D. F. Reese, clerk.

On writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota in the suit of John P. O'Connor, plaintiff and defendant in error, *vs.* Jacob Gertgens, defendant and plaintiff in error.

In the Matter of the Petition of said JACOB GERTGENS, Plaintiff in Error.

Assignment of Errors.

On this 19th. day of May 1902, comes the said Jacob Gertgens, by F. W. Murphy and Stockslager & Heard, his attorneys, and Thomas Kneeland and L. C. Spooner, of counsel, and says:

That in the record and proceedings in the above entitled matter there is manifest error in this to-wit:

I.

The court erred in holding that Jacob Gertgens, the plaintiff in error, acquired no legal right or claim to the tract in controversy, the same being within the twenty mile indemnity limits of the St. Paul, Minneapolis & Manitoba Railway grant, by reason of his homestead settlement made thereon April 15th. 1891, and of his homestead application duly made and filed thereon November 27, 1895, and renewed January 20, 1897, for the reason stated that this tract, at said dates and until issuance of patent to Ireland, was legally withdrawn from settlement and homestead rights by order of the Commissioner of the General Land Office, dated May 25th. 1869, made pursuant to congressional direction contained in section 7 of the act of March 3, 1865 (13 Stat. 526), in aid of the grant to said railway company.

II.

The court erred in not holding that said withdrawal was revoked and set aside by the act of September 29, 1890 (26 Stat. 496), which expressly repealed section 7 of the former act directing said withdrawal to be made; and that at the dates of Gertgens' settlement and homestead application said tract was public land of the United States subject thereto.

III.

The court also erred in not holding that the Secretary of the Interior by his official order dated May 22, 1891 (Ex. B.), made pursuant to said repealing act of September 29, 1890, *supra*, expressly revoked and set aside the former withdrawal of May 25, 1869, thereby restoring this tract and other lands within the indemnity limits of said grant to settlement and entry under the land laws of the United States.

IV.

The court committed manifest error in declaring and holding that the Secretary of the Interior had authority to withdraw the in-

demnity lands within this grant from settlement and entry at will, and without congressional direction enabling him so to do.

k

V.

Pursuing this erroneous construction of the law, the court likewise erred in holding that the letter or order of Acting Commissioner of the General Land Office, W. M. Stone, dated May 28, 1891, (Ex. "C") made six days subsequently to the Secretary's revoking order (Ex. "B"), did or could legally limit the scope and effect of the Secretary's revocation to lands "not embraced in the selections heretofore made or applied for by said railroad company," or prevent the attaching and continuance of the settlement rights of plaintiff in error initiated in April 1891, or if his rights under his homestead application made November 27, 1895, and January 20th, 1897.

VI.

The court erred in not holding that said order of May 28, 1891, of Acting Commissioner Stone in so far as it, to any extent whatever, purported to make a new withdrawal of said indemnity lands, or to renew, extend, or continue the former withdrawal of May 25, 1869, was absolutely nugatory and without legal effect, because any such executive power to make withdrawals of indemnity lands was expressly withdrawn and divested by the said act of September 29, 1890, repealing section 7 of the granting act of March 3, 1865, conferring such authority.

VII.

The court erred in not holding that the selection of the land in controversy made by said company April 22, 1885, being a selection in bulk without any specification or claim of loss, tract for tract, as required by law, was invalid and not a legal claim attaching to the land in controversy, as held by the Commissioner of the General Land Office October 23, 1896, when, for this reason and because there were no deficiencies in the place limits, he finally rejected and cancelled said selection; therefore said selection did not prevent the attaching of Gertgens' rights under his settlement and application aforesaid.

VIII.

The court erred in not holding that the selection of August, 1891, was wholly illegal as repeatedly held by the Secretary of the Interior and Commissioner of the General Land Office on October 23, 1896, because the specified losses relied on were no part of the grant of said railroad company, but belonged to a different grant entirely known as the St. Vincent extension; and to which claimed losses lying within the latter grant, the company making said selection of August 1891, had no right or title whatever.

IX.

The court erred in holding that the said selection of August 15, 1891, was made by said railroad company as an amendment to its

former selection of April 22, 1885, and that said amendment was made by consent and authority of the land officials of the Government. On the other hand said court should have found the fact and law to be that upon the filing of said selection in August 1891, the company thereby abandoned and relinquished all claim and right acquired by virtue of said selection of April 22, 1885, to the land in dispute.

X.

The court erred in not finding that said withdrawal having been revoked by the act of September 29, 1890, and especially by the order of revocation issued by the Secretary May 22, 1891, Gertgens' settlement upon said tract on April 15, 1891, and thereafter continued gave him the prior right thereto as against any rights acquired under said selection of August 15, 1891, his prior rights attaching *eo instanti* upon the abandonment of the selection of April 22, 1885.

XI.

The court erred further in holding that by the Commissioner's decision of July 17, and October 23, 1896, whereby he cancelled and rejected the said selections of April 22, 1885, and of August, 1891, he withdrew, or continued to withdraw the land in dispute from the attachment of Gertgens' homestead rights evidenced by his settlement in April 1891, and his homestead application dated November 27, 1895, and renewed January 20, 1897; or that said decisions subjected Gertgens' rights, or attempted to subject his rights in any sense to the claim of John Ireland as purchaser of these lands from the railroad company; but on the contrary, the court should have held that these decisions simply directed that no final disposition should be made of these lands until Ireland and all other claimants should have an equal right to present their respective claims thereto, and that upon an adjudication thereof an entry would be granted to the one whose rights should be determined as superior.

XII.

The court erred in finding that upon appeal by defendant from the decision of the register and receiver rejecting his application to enter said tract as being in conflict with said railway selection of April 22, 1885, said decision was sustained; whereas upon such appeal said selection was cancelled by the order of the Commissioner of the General Land Office on October 23, 1896.

XIII.

The supreme court of Minnesota erred in holding that John Ireland, patentee from the United States of the land in controversy, and grantor of O'Connor, defendant in error, was a *bona fide* purchaser from the St. Paul, Minneapolis & Manitoba Railway Company within the meaning of section 5, of the act of Congress passed March 3, 1887,

entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes" (25 Stat. 656).

XIV.

The court erred in not holding that said Ireland's alleged contract of purchase from said railway company dated March 30, 1883, relied on in this case as supporting a valid purchase under said act of Congress, was a mere option agreement unexecuted and dependent on a contingency which never happened, without consideration or mutuality of obligation between the parties thereto, hence was *nudum pactum* and wholly deficient as a legal contract; and that said instrument did not constitute said Ireland a *bona fide* purchaser within the meaning of said act of Congress and the land officials in holding said Ireland to be such *bona fide* purchaser under the same and in permitting him to enter and purchase said tract of land as such under section 5 of said act of Congress, and issuing to him patent of the United States to said tract against the claim and protest of plaintiff in error, wholly misconstrued and misapplied said act of Congress to the great injury of plaintiff in error as the prior legal claimant and applicant for said land under the homestead laws of the United States.

XV.

The court erred in holding that whether or not Ireland was a *bona fide* purchaser of the land in dispute under the act of March 3, 1887, was a question of fact and not of law.

XVI.

It also erred in holding that the finding and decision of the Land Department, that Ireland was such *bona fide* purchaser, was a finding of fact which was conclusive upon the courts and not subject to review in these proceedings in behalf of the plaintiff in error.

XVII.

The court erred in holding that the said settlement of said plaintiff in error upon said land and his claim thereto under the homestead laws of the U. S., subsequently to December 1st, 1882, together with his said application to enter same and his tender of fees and proof of his qualifications as a homestead claimant, did not bring him within the 2nd proviso of section 5 of said act of March 3rd, 1887, and thereby except said land from the purchase clause of said section and prevent said Ireland from either purchasing, or obtaining patent to, said land under said 5th section.

XVIII.

The court erred in not holding that said John P. O'Connor, defendant in error herein, was a mere naked trustee of the legal title

to said land subject to the paramount equities of said plaintiff in error thereto, and in not decreeing that said John P. O'Connor convey said legal title to said plaintiff in error, Jacob Gertgens, and, upon his failure so to do, that the decree of said court stand as such conveyance.

Submitted by

STOCKSLAGER & HEARD AND
F. W. MURPHY,
Attorneys for Plaintiff in Error.

THOMAS KNEELAND AND
L. C. SPOONER,
Of Counsel.

n [Endorsed:] 12757 Copy Supreme Court of United States. Assignment of errors. John P. O'Connor, pl'ff, and def't in error. *vs.* Jacob Gertgens, def't and pl'ff in error. Stockslager & Heard, F. W. Murphy, L. C. Spooner, Thomas Kneeland. attorneys for pl'ff in error.
Endorsed: Filed May 19, 1902 D. F. Reese, clerk

o STATE OF MINNESOTA:

Supreme Court, October Term, 1901.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant.

Assignment of Errors.

The court erred:

1. In holding and deciding that the plaintiff, as against the
p defendant, was the owner in fee simple of the land described in the complaint. The first conclusion of law is not supported by the findings of fact. (Paper book, fols. 541–542.)

2. In holding and deciding that the defendant had no right, title, estate, claim, lien, or interest in or to said land described in the complaint. The second conclusion of law is not supported by the findings of fact (F. 542).

3. In not holding and deciding that all the rights of plaintiff in and to said land were inferior and subject to the rights and equities of defendant thereto, and that said plaintiff held the naked legal title thereto as trustee for defendant.

4. In not holding and deciding that the rights and equities of defendant in and to said land were paramount and superior to the rights and title of plaintiff thereto and that defendant was entitled to a decree and judgment of said court that plaintiff convey said premises to defendant by proper deed of conveyance, and, in case of his refusal or neglect so to do, that the decree of said court stand in lieu thereof as conveyance of said premises to the defendant.

5. In holding and deciding that plaintiff was entitled to recover of defendant the immediate possession of said land and to have immediate restitution thereof. The third conclusion of law is not supported by the findings of fact (F. 543).

q 6. In not deciding that defendant was entitled to the possession of said land and that all the right, title and interest of plaintiff in and to the same be vested in defendant and the possession thereof be decreed to him.

7. In holding and deciding that defendant was not entitled to the relief demanded in his answer nor to any relief whatever. The fourth conclusion of law is not supported by the findings of fact (F. 543).

8. In holding and deciding that plaintiff was entitled to recover of defendant his costs and disbursements in said action. The fifth conclusion of law is not supported by the findings of fact (F. 543).

9. In ordering that judgment be entered in favor of plaintiff and against defendant (F. 543).

10. In adjudging and determining that said plaintiff was, as against defendant, the absolute owner of the land described in the complaint or any part thereof (F. 564).

11. In adjudging and determining that plaintiff was entitled to the immediate possession of said land or any part thereof (F. 564).

12. In adjudging and determining that said defendant had no title, right or interest in said land (F. 565).

13. In adjudging that execution should issue from the court to restore said land to the possession of plaintiff (F. 565).

14. In adjudging that plaintiff recover of defendant any costs or disbursements whatever (F. 565).

r 15. In not deciding, adjudging, and decreeing that the rights and equities of defendant in and to the land described in the complaint herein were paramount and superior to the right, title, and interest of plaintiff thereto, and that said plaintiff convey said premises to defendant by proper deeds of conveyance, and, on his default so to do, that the decree and judgment of the court stand in lieu thereof as a conveyance of said premises to the defendant, and that the possession of said premises be vested in defendant and that defendant have judgment against plaintiff for the costs and disbursements of said action.

16. In deciding and adjudging that the rulings of the Land Department of the United States in allowing John Ireland to purchase said land from the United States under the congressional act of March 3, 1887, should be sustained, and that the patent to said Ireland and his deed to plaintiff be upheld as against the rights and equities of defendant in and to said land.

17. In deciding and adjudging that defendant, under and by virtue of his settlement and residence upon, and cultivation and improvement of, the land in controversy and his application for homestead entry thereon, was not in a position to question the decision of said Land Department officials in favor of Ireland's said

purchase nor his patent to said land nor his said deed to plaintiff.

s 18. In deciding and adjudging that said land continued under withdrawal from public sale at any time after September 29th, 1890, and was not subject to homestead entry by defendant.

19. In not deciding and adjudging that, under and by virtue of defendant's settlement and residence upon, and cultivation and improvement of, said land, his homestead application therefor on November 27, 1895, should and ought to have been allowed and a homestead entry granted to him thereon by the Land Department officials, and that all their rulings thereon adversely to defendant were erroneous and in violation of law.

20. In not deciding and adjudging that the protest of defendant against said Ireland's application to purchase said land should have been sustained and defendant's application to enter same as his homestead allowed, and that all the rulings of the United States Land Department officials thereon adversely to defendant were erroneous and in violation of law.

21. In holding that the order of the Commissioner of the General Land Office, of October 23, 1896, cancelling the railroad selections withdrew the land or continued former withdrawals for the benefit of Ireland, and thereby annulled, destroyed, or barred all rights of the defendant under his homestead claim.

22. In not holding that such order, as well as that of July 17, 1896, holding the selection for cancellation, merely directed

t the local officers to permit no other disposition of the land until the claims of Ireland and of all homestead claimants then pending should be disposed of, and not in any sense a legal withdrawal, or continuation of former withdrawals for the benefit of Ireland, as held by the court.

23. In holding and deciding that, although the decisions of the Commissioner and Secretary in permitting Ireland to purchase the land in controversy, under the act of March 3, 1887, and the issuing of patent to him were all unwarranted, illegal, and erroneous, the defendant acquired no right to the land by his homestead settlement, residence, improvement, and cultivation, for the reason that the land had been withdrawn for the benefit of the railroad company and embraced in a selection for its benefit, prior to his settlement, and that after the withdrawal was set aside and the selections cancelled, the Commissioner continued the withdrawal for the benefit of Ireland; and hence, the defendant having no right to the land, could not question Ireland's title.

24. In not holding and deciding that notwithstanding the withdrawal and the illegal and erroneous selection of the company, the defendant acquired as against every one except the United States, valid equities in and to the land by his homestead settlement, residence, cultivation, and improvement, followed by his application, which attached and became a legal claim, *eo instanti*, upon the revocation of the withdrawal and cancellation of the se-

u lection, to the exclusion of Ireland and everyone else, which the Land Department should have recognized and protected,

and that if an attempted withdrawal was made for Ireland's benefit, it was without authority of law and void, and could in no wise effect defendant's rights.

01 STATE OF MINNESOTA:

Supreme Court, October Term, 1901.

STATE OF MINNESOTA, }
County of Traverse. }

In District Court, 16th Judicial District.

JOHN P. O'CONNOR, Plaintiff, }
vs.
JACOB GERTGENS, Defendant. }

Complaint.

Said plaintiff alleges that he is, and for more than six months last past has been the owner and entitled to the immediate possession of the following described land in said county, to-wit:

The south west quarter of section nine (9), in township one hundred twenty-five (125) of range forty-five (45) W.

That said defendant is wrongfully and unlawfully in possession of said tract of land and the whole thereof. That plaintiff has demanded the possession of said tract from the defendant before the commencement of this action, but he has refused to surrender same.

Wherefore, plaintiff demands judgment for the immediate return and restitution of said premises, besides the costs and disbursements of this action.

Dated February 15th, 1900.

E. T. YOUNG,
Plaintiff's Attorney, Appleton, Minnesota.

1 STATE OF MINNESOTA:

District Court, Traverse County.

JOHN P. O'CONNOR, Plaintiff, }
vs.
JACOB GERTGENS, Defendant. }

Answering the complaint herein, defendant denies each and every allegation in said complaint contained, except as hereinafter specifically admitted, qualified or denied.

Alleges that the defendant —— —— is, and for several years last past has been, in the possession and occupancy of the premises described in said complaint, claiming the same, as was during all said time, and still is, well known to plaintiff; and that defendant has refused, and still refuses, to deliver the possession thereof to plaintiff.

2 For a further defence and as a counterclaim and cross bill herein, the defendant —— —— alleges:

That, at the dates hereinafter stated, the land in said complaint described, to-wit: the south west quarter of section *section* nine (9) in township one hundred twenty five range forty five west situate in said county and State, was surveyed public land of the United States, lying and being within the twenty mile indemnity limits of the Saint Paul, Minneapolis and Manitoba Railway Company under its grant defined by acts of Congress dated March 3, 1857, (11 Stats. 195) and March 3, 1865, (13 Stats. 526).

That said tract with other lands was withdrawn from settlement and entry under the land laws of the United States, May 25 1869, which said withdrawal was duly and legally revoked by act of Congress dated September 29, 1890, (26 Stats. 496,) and on May 22, 1891, the Secretary of the Interior also issued his executive order revoking same.

That said railway company never made valid selection of said tract, neither did said tract ever inure to, or in any legal manner, become subject to the claim or rights of said company under said grant.

That said company on April 22nd 1885 filed with the proper land officers of the United States its selection of, and claim to, said tract and other lands, under the indemnity provisions of its said grant,

3 but said selection did not claim or designate any particular loss of other lands suffered by said company within its primary or granted limits, in lieu of which, it claimed the right to select this tract and others as such indemnity.

August, 1891, said company sought to amend said defective selection by substituting another list or selection in lieu thereof, which substituted list is filed with the said land officers of the United States.

The said substituted list or selection was illegal and void in this:

The tract of land designated therein as the base, or loss, in lieu of which said company claimed the tract in controversy, was not a part of its granted lands, but was a part of the grant of lands made by act of Congress in favor of the Saint Vincent extension of the Saint Paul, Minneapolis and Manitoba Railway Company, dated March 3, 1871 (16 Stats. 588), to which said company had no right or title whatever, hence was not entitled to indemnity claimed therefor in said rearranged list; and for which reason, both said lists were, upon due consideration by the Commissioner of the General Land Office, as hereinafter explained, duly cancelled and rejected by his official decision of October 23d, 1896.

The defendant, —— —— on the 15 day of April 1891 being a citizen of the United States, and a resident of the State of Minnesota, over twenty-one years of age, the head of a family and otherwise qualified as a homestead claimant under the laws of the United States, entered upon, took possession of, and made homestead settlement and improvements upon the tract of land in controversy, the same being at the time vacant public land of the United States sub-

ject to such settlement, and has ever since that date, main-
4 tained and continued in said possession and use of said tract as a homestead, by residing upon, and otherwise using it for his exclusive use as a home by cultivating it to crops and otherwise.

That his improvements and cultivation of said tract at the time of the filing of the protest against Ireland's application to purchase as hereinafter stated consisted of a dwelling house 18 x 26 feet, barn 18 x 24 feet, granary 16 x 20 feet, a good well and 110 acres of land under cultivation

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and now consist of the same and in addition thereto of

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all of the value — twelve hundred dollars.

That afterwards on the 27th day of November 1895, said defendant —— —— being a qualified homestead claimant as aforesaid, presented to, and filed with, the register and receiver of the United States land district of Saint Cloud, —— at the city of Saint Cloud, —— State of Minnesota, within which land district said tract is situate, a proper legal homestead application for said land, it being at the time legally subject thereto, accompanied by all required proofs of his qualification and rights as a homestead claimant, with tender of lawful fees and commissions.

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That said register and receiver having received and filed said homestead application as required by law, thereafter on the 2nd day of December, 1895

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rejected said application and refused to permit said defendant to enter said lands under the homestead laws, as they should have done, alleging as grounds for said rejection, that the Saint Paul, Minneapolis and Manitoba Railway Company had the prior right and claim to said tract by virtue of said selections.

That within the thirty days allowed by law, said defendant —— —— appealed from said rejection to the Commissioner of the General Land Office.

That in due course of business the Commissioner of the General Land Office entertained and considered the said appeal and, in con-

nection therewith, all rights and claims made to said land by the said railway company under the said selections, and on October 23d, 1896, —— 1896, rejected and cancelled all selections and claims of said company to said tract as invalid and illegal

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which decision, on said date, became final against the rights of the said company to said tract.

Wherefore said defendant says that upon the final cancellation and extinguishment of said company's claim and title to said tract as above set forth, his —— claim and right thereto under and by virtue of his said settlement and homestead application should have been recognized and allowed by the said Commissioner of the General Land Office by virtue both of his rights under the general homestead laws of the United States, as well as under the provision of section five of the act of March 3, 1887, (24 Stats. 556).

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7 That subsequently to said settlement, and while said homestead application was pending as aforesaid, to-wit, on the 8th day of February, 1896, —— John Ireland laid claim to the tract in controversy and other land, by filing in said district land office at St. Cloud, —— Minnesota, his application to purchase said tract and other land under and by virtue of the fifth section of the act of Congress dated March 3, 1887, (24 Stats. 556) which said application so filed is in words and figures as follows, to-wit:

"*Application to Purchase Land in Accordance with the Fifth Section of the Act of Congress Approved March* 3, 1887.

No. —.

LAND OFFICE AT ST. CLOUD, —— MINNESOTA,
February 8th, 1896.

I, John Ireland, of the city of St. Paul, Minnesota, do hereby apply to purchase, in accordance with the 5th section of an act of Congress entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, (24 Stat. 556,) all of the lands north of base line and west of the 5th principal meridian," (here followed a description of the land described in the complaint and answer herein and of other lands), "containing twenty-two thousand and five hundred and sixty and forty-four hundredths (22,560.44) acres, according to the returns of the surveyor-general, for which I offer to give at the rate of one dollar and twenty-five cents ($1.25) per acre.

JOHN IRELAND, *Applicant.*

8 I, —— —— register of the land office at St. Cloud, —— Minnesota, hereby certify that the lands above described contain 22,560.44 acres, as mentioned above, and that the price agreed upon is $1.25 per acre.

—— ——, *Register.*

Affidavit in Support of the Foregoing Application to Purchase Lands in Accordance with the Fifth Section of the Act of Congress Approved March 3, 1887 (24 *Stat.*, 556).

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

I, John Ireland, being first duly sworn, say and declare upon oath, that I am a citizen of the United States, over twenty-one years of age, and a resident in the city of St. Paul, Minnesota; that I am the identical person who files the foregoing application, and believe that I am legally entitled to purchase the lands described therein as provided by the act of Congress therein mentioned; that on July 17, 1880, and March 30, 1883, I entered into and made contracts and agreements with the St. Paul, Minneapolis and Manitoba Railway Company for the purchase of fifty thousand (50,000) acres of land, within the indemnity limits of the grant or grants of 1857 and 1865 for what is now known as the "Main" or "Breckenridge" line of said company's railroad system, and that the lands embraced in the foregoing applications are a part of the lands so purchased by me from said company; that, in accordance with the contracts of
9 purchase so made, said company has conveyed to me such portion of said lands as have been conveyed to it under its

grant, and the lands now applied for are a part of the remainder; that I purchased said lands in good faith, and said company sold them to me as a part of its grant; that, believing that said company was entitled to and would receive title to said lands, and legally convey the same to me, I have sold, or agreed to sell, all or nearly all of the same, and many persons are occupying and making homes thereupon under the authority thus derived through me from the company; that all of said lands so purchased from said company are comprised in odd sections, and, as I believe, have been selected by the company; I verily believe, however, that the selections embracing these lands are subject to cancellation under the decisions of the United States Land Department (see 13 L. D. 440), to the serious injury of this applicant and his vendees, and this application is made in good faith to protect his interests and theirs; that at the date of sale by the company to me none of said lands were in the *bona fide* occupancy of adverse claimants under the pre-emption laws; that said lands have been in a state of reservation for railroad purposes ever since 1868, not subject to disposal for any other purpose, and that, therefore, a valid settlement or claim under settlement law, could not have been initiated, and was not, for any of them between December 1, 1882, and the passage of the act of 1887 under which this application is made; that all of the lands hereby applied for are coterminous with constructed parts of said railroad, and that there is no legal adverse claim for any part of said lands now pending before the Land Department of the Government.

JOHN IRELAND, *Applicant.*

Sworn to and subscribed in my presence, at my office in the city of St. Paul, this 8th day of February, A. D. 1896.

EDWARD G. ROGERS,
[SEAL.] *Clerk of Dist. Court,*
By JOS. R. KING.

Notice of Intention to Make Proof of Right of Purchase under the Fifth Section of the Act of Congress Approved March 3, 1887.

To the register and receiver, United States district land office, St. Cloud, —— Minnesota.

GENTLEMEN: You are hereby notified that the undersigned, John Ireland, of St. Paul, Minnesota, by virtue of certain agreements and contracts entered into and made July 17, 1880, and March 30, 1883, by and between him, the said Ireland, and the St. Paul, Minneapolis and Manitoba Railway Company, claims the right to purchase from the United States, as provided by the fifth section of an act of Congress approved March 3, 1887 (24 Stat., 556), the several pieces or parcels of land hereinafter described, lying within the county of Traverse, —— in the State of Minnesota, and subject to the jurisdiction of said United States district land office at St. Cloud, —— Minnesota; which said lands are a part and parcel of the lands em-

braced within the indemnity limits of the grant or grants made by acts of Congress approved March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), to the Territory and State of Minnesota to aid in the construction of a railroad "from Stillwater, by way of
11 St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river," which grant or grants the State conferred upon the St. Paul, Minneapolis and Manitoba Railway Company, and which railroad is now known as the "Main" or "Breckenridge" line of said company. Further, said Ireland will appear before you, at your office in St. Cloud, —— on such day as you may fix, to make proof, in the manner prescribed by official circular of February 13, 1889 (8 L. D., 348), of his right, as aforesaid, to purchase said lands, specifically described as follows, to-wit:" (here followed a description of the land described in the complaint and answer herein with that of other lands), "containing in the aggregate, 22,560.44 acres.

There has been, so far as said Ireland is informed, no formal declaration by the Secretary of the Interior, or other competent authority, that said lands, or any of them, were excepted from the grant for railroad purposes and the St. Paul, Minneapolis & Manitoba Railway Company's selections, embracing the same, may be properly considered as adverse claims of record. The said Ireland believes, however, that the said selections are of the same character as, and stand upon no better footing than, those considered by the Secretary of the Interior in his decision of October 23, 1891 (13 L. D., 440), and that they are liable to cancellation at any time, under the rule and for the reasons stated in said decision. Therefore, said Ireland, a purchaser of said lands, in good faith, from said company, seeks by this proceeding to protect his rights and interests in the same in the manner provided by law, and in accordance with regulation prescribed by the Land Department.

The following named persons have entries or application for entry pending for parts of said lands herein described, and
12 theirs are claims of record, viz: Frank W. Watkins, of Adelaide; Ernest E. Terpina, of Brown's Valley; Louis M. Johnson, of Big Stone; Louis A. Westphal, of Johnson; Bernard Peyton, Richard Peyton, and Hugh Peyton, of Collis; Luke L. Rowan, John W. Ginnaty, Thomas F. O'Phalen and John J. Rowan, of Graceville; John E. Allmen, Edward Burke, Herman Greger, Fred Utrecht, Edward Kalding, Frank Seifert, Wilhelm Krenz, Christian Jenson and Richard Wall, of Dumont; Fred Wilkins, Thomas Peyton, Julius Nott, Archibald Burton, John Harps, Hermann J. Burggraf, John Weinkes, Joseph Wilhelm, Frank Wilhelm, Daniel C. Terpina, John B. Fallin, Atty Peyton, Gustus Zell, John Sullivan and John Will of Wheaton, all in the State of Minnesota.

In the notice of this proceeding, which by law and official regulations you are required to publish in a newspaper near the land and to post in your office, please make said railway company and each and all of the persons named in the preceding paragraph parties, and specifically cite each and every one of them to appear, at the

time and place fixed for hearing the proof to which this notice relates, and present objection, if any they have, to the submission of such proof or consummation of title to said lands by the said Ireland in the manner hereby proposed.

Very respectfully, JOHN IRELAND, *Applicant*,
By CHAS. H. BABBITT, *Attorney*.

Witnesses:
JAMES STODDARD,
Of St. Paul, Minn.
JOHN P. O'CONNOR,
Of St. Paul, Minn.
M. J. McDONNELL,
Of Graceville, Minn.
MAURICE GREEN,
Of Graceville, Minn."

13 That in pursuance of published notice given by the register of the said land office, as required by law, that said Ireland would submit his proof in support of his said application to purchase before S. W. Frasier, United States commissioner. at Wheaton, Minnesota, on January 20th, 1897, said commissioner having been duly appointed in that behalf by the Commissioner of the General Land Office, and notifying all adverse claimants to lands applied for to appear and protest, or otherwise defend their claim thereto against the application of said Ireland, the defendant and said Ireland did so appear at said time and place in person and by their attorneys, when the following proceedings were had, filed and recorded by said commissioner, to-wit:

Said Ireland in support of his said application to purchase, offered in evidence and had filed, and recorded the following testimony, evidence and instruments of writing:

Said Ireland being duly sworn testified in his own behalf as follows:

"In July, 1880, I entered into an agreement with the St. Paul, Minneapolis & Manitoba Railway Company, which agreement gave me the sole and exclusive right to place settlers on certain lands in Big Stone and Traverse counties, and to sell such lands to persons desiring to settle thereon, or otherwise to make purchase of them. The agreement was made in writing, two copies being made thereof, one of which is retained by the railway company, and the other retained by myself."

A written instrument, being shown said Ireland, was identified as the contract referred to by him in his testimony, and was
14 thereupon offered in evidence by him, filed and recorded, and is in words and figures as follows, to-wit:

"This agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Right Reverend John Ireland, of St. Paul, Minnesota, party of the second part,

Witnesseth: That the party of the first part in consideration of the premises hereinafter set forth has given and does hereby give to the

party of the second part until the 31st day of December, 1881, the sole and exclusive right and authority to place settlers upon and of making sales or agreements of sale to parties desiring to settle upon or purchase the same all those tracts and parcels of land situate in the counties of Big Stone and Traverse in the State of Minnesota to which said party of the first part is or may be entitled by virtue of the land grants to said State for its benefit, of March 3, 1857, and March 3, 1865, which said lands are included within the indemnity limits so called of the land grant belonging to the main line of said company's railway in the counties above named and which lands are particularly described in the schedule hereto attached, it is understood by the parties hereto that the party of the first part has already selected and applied for said lands as inuring to it under said land grants and that such applications are now pending before the Department of the Interior and this agreement is entered into subject to the acquiring of said lands by the party of the first part of its said land grant.

It is further agreed between the parties hereto, that said parties of the second part shall be at all the expense which may be required for advertisements and pay of agents in making sales or agreements for sales of said lands and that the price for which said lands shall be contracted for or sold to purchasers shall not be less than four dollars per acre, payable upon the ordinary terms as to times and payments prescribed by said party of the first part in making sales of its other lands.

It is further agreed that as soon as the party of the first part shall obtain title to said lands and be in position to enter into contracts, therefor, that said party of the second part shall transfer to it all agreements of sale for said lands or any of them then in his hands, and that therefrom the land commissioner of said party of the first part shall enter into a proper agreement of sale in the name of the party of the first part with the purchaser or purchasers named in such agreements.

It is further agreed by the parties hereto that said party of the second part shall be allowed and paid by the party of the first part to compensate him for advertisements and other expenses incurred by him in making said sales or agreements of sales above provided for as follows: in case he shall have disposed of and sold or given contracts of sale for two-thirds of the total amount of said lands in said schedule named, on or before December 31, 1881, then he shall receive ten per centum of the gross amount realized from said sales by the party of the first part, which shall be paid to him from time to time as the same shall be paid unto the party of the first part, but in case the party of the second part shall have disposed of a less quantity than two-thirds of said lands on said December 31, 1881, then his commission on said sales shall be only eight per centum of the amount realized therefrom by party of the first part, payable as aforesaid.

It being agreed that until December 31, 1881, only eight per centum of said receipts from said lands shall be paid to the party of the

second part hereunder and the remaining two per centum in case of a sale or disposition of two-thirds of said lands as hereinbefore
16 provided shall be paid to the party of the second part on said 31st day of December, 1881, payments of said eight per centum as it shall accrue under the terms of this agreement to be made to the party of the second part on the first days of January and July of the years 1880 and 1881, respectively.

The party of the first part hereby reserves over and across all of said lands a strip at least one hundred and fifty feet in width for right of way, snow fences and other railroad purposes for the use of the St. Cloud and Lake Traverse Railway Company where the lines of said company's road are now located or shall be hereafter located across said lands or any of them.

It is further understood between the parties that the first party shall promptly notify the second party as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from date of receiving any such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contracts in the usual form with the party of the first part and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold to him from this agreement.

In witness whereof the parties hereto have duly executed these presents, this 17th day of July, 1880.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.
W. B. ANGUS, *Vice President.*
JOHN IRELAND.

It is further agreed that the additional lands included in the second list hereto attached shall be included in this contract upon the same terms and conditions as apply to the list first attached,
17 it being understood and agreed however, in regard to the lands embraced in said second list that the party of the second part will in all cases where any person or persons may have obtained any rights or claim upon any such lands by virtue of settlement thereon or under any license or permission from the party of the first part or its predecessor that such rights or claims shall be respected and fairly treated by said party of the second part.

W. B. ANGUS,
Vice President.
JOHN IRELAND."

That the land first described in this answer and in said complaint was described and set forth in one of the lists of lands referred to in said contract as being attached thereto, said lists describing in all 66000 acres.

Defendant duly objected to said testimony relating to said written contract of July 17, 1880, for the reason that said instrument should speak for itself and that it is not competent to explain, or change its

terms by verbal testimony. He then and there also objected to the introduction of said contract of July 17, 1880, for the reason that it is not, and does not purport to be, a contract to purchase, nor to convey any interest whatever in the lands described therein to said Ireland; which objections were duly entered on the record of said proceeding by said commissioner.

Said Ireland further testified in answer to the following questions propounded by his counsel:

"Q. Did you have a conversation with any official of said company in 1883, relative to the aforesaid agreement, and make
18 a new arrangement with the company respecting said land; if so, describe the conversation as nearly as you can remember?

"A. In March, 1883, I had such conversation with James B. Power, land commissioner of the St. Paul, Minneapolis and Manitoba Railway Company. I said to him 'My contract made a few years ago is now expired without the railroad having secured title so far; I have been to a very large expense inducing immigrants to settle on those lands; I now propose another agreement; I will buy, myself, a large quantity of those lands, and holding them as my own, deal directly with the settlers, putting on the lands any prices I may choose, for my own benefit.' Mr. Power answered, 'Very well.' I replied 'I wish you to understand very well that I am buying those lands as my own, so that I may make as far as I think expedient, a profit out of them;' he said 'The lands are yours, I hope you will make two hundred thousand dollars out of them.' He then began jotting down the nature and conditions of the contract.

"Q. Was the conclusion reached by reason of that contract subsequently reduced to writing in the form of an agreement or contract; if so, how was that contract executed?

"A. It was so reduced to writing, the contract was executed in duplicate by Mr. Power and myself, he retaining one copy, and I the other."

Said Ireland then introduced in evidence and had filed as the contract referred to by him in his testimony, an instrument in writing dated March 30, 1883, marked "Exhibit C," together with endorsement upon the back of said contract of its having been recorded in the office of register of deeds of Traverse county, Minnesota. Said contract is in words and figures as follows, to-wit:

19 "EXHIBIT C."

"*Graceville Colony Second Contract.*

Whereas a certain agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Rev. John Ireland, party of the second part, bearing date the 17th day of July, A. D. 1880, by which the party of the second part was given the sole and exclusive right to sell and locate settlers upon a

certain lot of lands in the counties of Big Stone and Traverse, in the State of Minnesota, which lands are particularly described in said contract and among other provisions of said contract it provides:

That the party of the first part shall notify the party of the second part as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from the date of such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contract in the usual form with the party of the first part and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold to him by this agreement.

Now therefore; the contract herein referred to, having expired on the 31st day of December, A. D. 1881, and the R. R. Co., not yet having acquired title to the lands in question, it is now agreed between the R. R. Co. and the Rev. John Ireland that when title to these lands *are* acquired by the R. R. company and notice of same is given to Rev. John Ireland he shall have the privilege and right at any time within 60 days of date of said notice, of purchasing for himself or for such parties as he may designate (due regard being had as stated in supplement to said contract for settlers who may have obtained any claim upon such lands previous to the date of said contract) any or all of the lands included in said contract not to exceed the amount of 50,000 acres at uniform price of four dollars per acre, ten per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland according as the moneys are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate, the conditions of sale usual with the company shall be observed, or at least the interest upon the purchase money shall be paid from the date of purchase to the fifteenth day of December following, when the usual condition shall be enforced.

(Signed) JAMES B. POWER,
Land Commissioner St. P., M. & M. R'y Co.

Office of land department, St. P. M. & M. R'y, March 30, 1883.

JOHN IRELAND."

To each of which questions and answers relating to said contract, said defendant then and there duly objected for the reason that said contract must speak for itself, all prior understandings and verbal agreements relating thereto being merged therein. Defendant also objected at the time to the introduction of said contract, because on its face it does not purport to be a contract of purchase conveying a present interest in lands described therein, hence is no evidence of a purchase of lands as required by the said act of March 3, 1887, and that neither party thereto could contract against the right of settlers who may have become interested in these lands between the dates

of these two contracts, which objections were duly recorded;
21 also that said contract not being acknowledged or witnessed as required by the statutes of Minn. was not entitled to record.

Ireland's counsel then propounded the following question:

"Q. What consideration, if any, did you at the time, or have you prior to the date of the 1883 contract, given to the railroad company for the execution of their contract?

Ireland answered as follows:

"A. The consideration in view of the railroad company made with me, the agreement in question was the labor which I had given and was giving to bring settlers along the line of the company, and the large expenditures which I had made and was making for the same purpose.

Defendant then and there objected to said question and answer as incompetent, irrelevant and immaterial, which objection was duly recorded.

Ireland's counsel then asked the following questions to which witness made answer as herein set forth:

"Q. Why did you not purchase all the land embraced in the first contract of 1880, the entire sixty-six thousand acres described in that contract?

"A. Largely because I was not sure that I could handle successfully more than 50,000 acres, and I did not wish to enter into an agreement to do anything, which I was not morally sure I could do.

"Q. Then if the new contract had been a mere renewal of the former, you would have embraced therein all of the land?

"A. I would in such a supposition have taken under the second agreement all the lands I could get hold of, because then there would have been no risk on my part, and there might be gain.

22 "Q. Did you have knowledge or information at the date of this second contract respecting the condition of these lands as to occupancy by *bona fide* settlers under the United States laws?

"A. So far as I had information, and I had taken pains to obtain good information, there were at that time no such occupants on any of the lands.

"Q. Did you believe at the date of the last mentioned contract, that is the contract of 1883, that the St. Paul, Minneapolis and Manitoba Railway Company had a right to sell these lands?

"A. I did.

"Q. Were they sold to you by the said company as part of its grant?

"A. They were.

"Q. Did you consider yourself obligated by said contract to purchase the entire 50,000 acres of land to which it relates?

"A. I certainly did.

"Q. Provision is made in said contract that the said company

shall notify you of the acquirement of title by it to any of said lands, whereupon you are required to select and settle for such of said lands as you may desire having the title thereto, conveyed directly to you, or to such parties as you may designate, what was the object of inserting the clause or such party as he may designate?

"A. This clause was inserted by Mr. Powers at my own request. I wished to avoid the expense and trouble of double deeds and double record."

Defendant, to each of the foregoing questions and answers, entered his objections as irrelevant, incompetent, and immaterial, and because witness seeks thereby to explain, change and add to the written contract in evidence, the terms of which are unambiguous; and because such questions and answers relate entirely to alleged understandings between Ireland and the railroad company, or of Ireland alone, prior to the execution of said contract, which objections were duly recorded.

23

In answer to the following questions by his counsel, Ireland testified as follows:

"Q. Did the company ever notify you of the acquirement of title by it, to any of the lands embraced in the contract of 1883, and call upon you to make selection of and settle for the same; if so, and said notice was a written one, please produce and state what the company done in relation thereto?

"A. On March 28, 1889, the railroad company notified me that it had obtained title to some 26,000 acres of land embraced in my agreement with the railroad of March, 1883, and requested me to make what selection I wished of those 26,000 acres; I sent a letter to the railroad—I notified them that I would select out of the quantity put before me some 16,000 acres; and that I would release to them the remainder. They then sent me out a quitclaim deed to be signed by me in which they then were titled to the 8,000 acres that I did not wish to retain; the deed was duly signed and witnessed and placed in the hands of the land commissioner."

Ireland then offered in evidence and had filed the instrument referred to by witness as a quitclaim deed and had it marked Exhibit "D," which instrument is in words and figures as follows, to-wit:

24

EXHIBIT "D."

"This indenture made this twenty-eighth day of October, in the year of our Lord, one thousand eight hundred and ninety-one, between John Ireland of Ramsey county, State of Minnesota, party of the first part, and St. Paul, Minneapolis and Manitoba Railway Company, a corporation duly organized and existing under the laws of the State of Minnesota, party of the second part, witnesseth; that the said party of the first part, in consideration of the sum of one ($1.00) dollar, to him in hand paid by the said party of the

second part, the receipt whereof is hereby acknowledged, doth by these presents, grant, bargain and sell, release and quit claim to the said party of the second part, its successors and assigns, forever, all those tracts or parcels of land, lying and being in the county of Big Stone and State of Minnesota, described as follows, to-wit:"

(Here followed descriptions of several tracts of land other than that in the complaint and first hereinabove described and other than that embraced in Ireland's said application to purchase.)

"To have and to hold the same, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said party of the second part, its successors and assigns forever."

In testimony whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

JOHN IRELAND. [SEAL.]

Signed, sealed and delivered in presence of
R. I. O'REILLY.
JOHN P. O'CONNOR.

25 STATE OF MINNESOTA, }
County of Ramsey. }

On this third day of November, A. D. 1891, before me personally appeared John Ireland, a single man, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

JOHN P. O'CONNOR,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*"

Ireland then offered in evidence and had filed letter, with list of lands attached thereto, from the land commissioner of said railroad company to him, dated March 28, 1889, marked Exhibit "E," which instrument is in words and figures as follows, to-wit:

EXHIBIT "E."

(R. R. letter heading.)

"ST. PAUL, MINN., *March 28th*, 1889.

"Rev. John Ireland, St. Paul, Minn.

DEAR SIR: As provided in a contract for certain lands situated in the counties of Big Stone and Traverse in the State of Minnesota, entered into between yourself and R. B. Angus, vice pres. St. P. M. & M. R'y Co., dated July 17th, 1880, and later renewed by James Power, land commissioner for said company, I have now to inform you that this company is now prepared to fulfill the conditions of the contract to the extent of the following lists of lands.

The company having recently obtained patents to the same, I

have kindly to request that at as early a date as may be you
26 will notify the department which of these tracts you desire.
Very truly, J. BOOKWALTER, *L. C.*"

"List of lands in (SV. Ex.) deed No. 9 embraced in Bishop Ireland's contracts."

(Here followed descriptions of several tracts of land other than that in the complaint and first hereinabove described and other than that embraced in Ireland's said application to purchase.)

That none of the lands referred to in Exhibits "D" and "E," or either thereof, were embraced in Ireland's application to purchase aforesaid.

Defendant then and there objected to each of the last mentioned questions and answers as incompetent, irrelevant and immaterial; also objected to the introduction of said Exhibits "D" and "E," because they relate to other lands than those embraced in Ireland's application to purchase, which objections were duly recorded.

Counsel for Ireland then propounded the following questions, to which he made answer as herein set forth:

"Q. At the time of making selection under the notice, did you make payment for, and settle for any of these lands selected by you?

"A. Yes.

"Q. When you made such selection and settlement were there contracts and conveyances executed by the company for such lands, if so, to whom were they issued?

"A. Conveyances of one kind and other were made by the company, and mostly to myself directly."

Defendant then and there objected to each of last men-
27 tioned questions and answers for the reason that they are incompetent, irrelevant and immaterial, and relate to lands not embraced in Ireland's application to purchase.

Counsel for Ireland then propounded the following questions, to which he made answer as herein set forth:

"Q. It is provided by the contract of 1883, that ten per centum of all receipts from said lands shall be paid to you according as the moneys shall be received by the company, why was that clause inserted?

"A. During our conversation as to the purchase of those lands, Mr. Power was jotting down on paper the terms, conditions and natures of each. He read to me what so far he had jotted down. The right to purchase 50,000 acres at $4 per acre; I interposed at once he must change the figures. I do not wish to pay for the lands more than I should have paid for them, had I taken them under the first contract; I want them at $4 an acre less ten per cent.; he then put down 'Very well, ten per cent.' When I returned some days afterwards to execute the agreement, I found that the agreement rehearsed the words which had been jotted down in the draft, and it read as the present contract reads. I allowed the

words to stand, as they seemed to convey sufficiently but he in fact indicated a rebate. And moreover as I was issuing contracts at four dollars an acre to the settlers, in which it was stated that I would on certain conditions receive, obtain for them and from the railroad, contracts for them at four dollars an acre in which case they would themselves pay to the railroad four dollars an acre, I thought the wording of Mr. Power would suit exactly, as it enabled me to obtain a rebate through the railroad from the prices — in by those to whom I had issued contracts.

28 "Q. Is that rebate allowed to you when you make payment for land taken in your own name, as well as in cases where you designate some other person for whom your conveyance shall be made.

"A. Yes."

Defendant objected to each of the last mentioned questions and answers as incompetent because they relate to understandings and conversations had between Ireland and the railroad authorities prior to the execution of the contract of 1883, in evidence, and because it is sought thereby to explain and add to the legal significance of said contract, which objections were duly recorded.

Ireland's counsel then propounded the following questions, which he answered as herein set forth:

"Q. Have you sold any of the lands embraced in this application, or authorized agents to sell the same for you?

"A. I have, many of those lands, and authorized agents to sell them for me.

"Q. Have you entered into any written agreement with any person or persons authorizing them to sell any of these lands in your name, if so with whom?

"A. I have entered into a written agreement with E. S. Tyler of Fargo, authorizing him to sell lands in my name. With R. S. Tyler; such lands designated in my contract of 1883, and many of them contained in the list of lands now under discussion?

"Q. Was that contract like those of the railroad company executed in duplicate? If so what disposition was made of the several copies?

"A. Such contract was made in writing, two copies of it being duly executed, Mr. Tyler retaining one and I retained the other."

29 Said Ireland then filed and offered in evidence a written instrument dated December 30th, 1889, referred to by witness as contract made between him and R. S. Tyler of Fargo, North Dakota, which instrument is in words and figures as follows, to-wit:

EXHIBIT "F."

"This agreement, made and entered into this 30th day of December, A. D. 1889, by and between John Ireland of St. Paul, Minnesota, and R. S. Tyler of Fargo, North Dakota.

Witnesseth: That whereas, the said John Ireland wishes to dispose of certain lands in Traverse county, Minnesota, which he has acquired or may acquire from the Saint Paul, Minneapolis and Manitoba Railway Company, he hereby, for and in consideration of services rendered and to be rendered by the said R. S. Tyler, appoints the said R. S. Tyler, agent for the sale of so much of said lands as are or may be situated in township No. 126, ranges No. 45, 46 and 47, in sections No. 1 to No. 20 inclusive; township No. 125, range No. 45, in section No. 1 to 27 inclusive, in township No. 125, range No. 46 and in section No. 1 town No. 125, range No. 47, all being in Traverse county, Minnesota, for the term of three years from the present date, on the following conditions:

1. The lands shall be sold at prices which may from time to time be fixed by said Ireland and said Tyler; these prices never without the consent of both parties to be reduced below six dollars per acre.

2. All contracts shall be made out in the name and in favor of said Ireland, and so far as any obligation is to be incurred by him, the said contracts are to be signed by him, and all monies received on such contracts or in any way in payment for lands so to be remitted to the said Ireland at his demand.

3. As compensation in full for all his labors the said Tyler shall be entitled to one half of all proceeds, including the principal and interest received from the sale of such lands over and above the sum of four dollars per acre and the interest received on this sum of four dollars; the part of such proceeds appertaining to said Tyler to be given to him, when and only when the transactions between the purchaser and said Ireland shall be definitely closed as follows: either when the purchaser has paid in cash the full amount of the purchase price of the said land, or when the purchaser has paid in cash so much of the purchase price that the said Ireland may in safety to himself, assign to the purchaser the contract under which he himself holds the land from the railway company, and the assignment of the contract is accepted by the purchaser and approved by the said railway company, or again when by forfeiture of his contract with the said Ireland, by reason of noncompliance of the conditions the purchaser loses all legal claim to the land, leaving in the hands of said Ireland certain payments to a part of which under the terms of this agreement the said Tyler may have claim.

4. All monies received from the use or rents of such lands within the above described limits, as the said Ireland shall have actually chosen and settled for with the said railway company, shall be divided equally between the said Ireland and the said Tyler, on receipt of said monies by the said Ireland.

5. It is further agreed that the actual expense for handling
31 such lands over and above the personal labor of the said Tyler including taxes on said lands, and interest paid to the said railway company, for the purpose of holding said lands, over and above the interest received from the purchasers upon the amount to be paid to the said railway company, viz. four dollars per acre, shall be paid for from monies received from the sale of the said lands over and above the four dollars per acre, viz: those expenses are to be paid or shared jointly by the said Ireland and the said Tyler.

It is also agreed that a statement of the cash receipts upon the sale of said lands and the amount paid the said railway company by the said Ireland shall be rendered the said Tyler every three (3) months and that said Tyler shall have interest at seven per cent. (7 per cent.) per annum, from date of said statements upon said Tyler's half of the amount remaining in said Ireland's hands over and above the money paid to the said railway company.

It is further agreed that any and all of the lands heretofore sold by the said Ireland in the above described tract, that by any cause revert to the said Ireland shall be included in this contract upon the above described terms and conditions; also all lands heretofore sold by the said Tyler during the year 1889, in the above described tract be included in this contract upon the above described terms and conditions.

It is also further agreed that the said Tyler will duly and industriously make collections of all sums due by purchasers on contracts between them and the said Ireland, and also see that the taxes on said lands are paid.

This contract applies to lands covered at present by a contract from the said railway company in favor of the said Ireland, whether at present patented or unpatented, with the condition, how-
32 ever, that when such lands are patented by the said railway company, the said Ireland has a right at his own choice to select the lands he wishes to purchase definitely from the said railway company, and those not chosen are no longer to be covered by the present contract between the said Ireland and the said Tyler; and with the further condition that in the territory mentioned in this contract no larger proportion of the unpatented lands be sold by the said Tyler than the contract between said Ireland and the railway company allows for the whole territory mentioned in said contract.

It is also agreed that all sales of lands under this contract shall be made subject to the terms and conditions of the contract now existing between the said Ireland and the said railway company.

In testimony whereof, the parties hereto have hereunto set their names and affixed their seals the day and year first above written.

JOHN IRELAND. [SEAL.]
R. S. TYLER. [SEAL.]

Signed and sealed in presence of,
JAS. C. BYRNE.
JOHN P. O'CONNOR.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 31st day of December, A. D. 1889, personally came before me, John Ireland and R. S. Tyler, the persons named in and who executed the foregoing contract, and they each of them duly acknowledged that they executed the same as their own free act and deed.

JAS. C. BYRNE,
[SEAL.] *Notary Public, Minnesota,*
Residing in Ramsey County."

33 Defendant then and there objected to each of the last mentioned questions and answers as incompetent, irrelevant and immaterial; also objected in like manner to introduction of said instrument marked Exhibit "F," as incompetent and irrelevant, which objections were duly recorded.

Ireland's counsel propounded the following question, to which he made answer as follows:

"Q. Did you at any time address a letter to Samuel Hill, president of the railroad company, relative to making settlement of this land matter? If so can that letter be produced here?

"A. I wrote such letter March 14, 1894."

Said letter was then offered in evidence and marked Exhibit "G" which is in words and figures as follows, to-wit:

EXHIBIT "G."

"MARCH 14TH, 1894.

Mr. Sam'l Hill, building.

DEAR SIR: I beg leave to ask that at your convenience, some settlement be made regarding those lands in Big Stone and Traverse counties, for which I hold contracts from the railroad company, and upon which I have issued contracts to settlers. Without entering into details, I make this suggestion, that the Land Department issue to me contracts on those lands, for which I made first payment in the year 1892, the contracts bearing the dates of the payment made by me, and subject to the usual interest from those dates.

34 I am ready to give a release of all indemnity lands upon which I have issued no contracts to settlers, holding for myself and settlers nothing above 50,208.14 acres.

It would be impossible for me to release certain lands not yet patented to the railroad, included in the above 50,208.14 acres, because upon them I have issued contracts to settlers, and I am no longer free to make any other disposal of them.

Any arrangement that will suit the company without interfering with the obligation which I have assumed I shall be quite willing to accede to.

Yours respectfully, JOHN IRELAND."

Defendant then and there objected to said question and answer and to the introduction in evidence of said Exhibit "G," for the reason that Ireland is attempting thereby to manufacture evidence for himself bearing upon the legal effect and interpretation of his said contracts with the railroad company, which objection was duly recorded.

On cross-examination of Ireland by defendant's counsel the following questions were propounded to him, and to which he made answer as herein set forth:

"Q. You stated in your direct examination that the railroad company had given you notice, and the contract had been completed, deeds executed, and lands paid for as to certain lands; those lands were those only which had been patented to the railroad company, were they not, and did not include any of the lands embraced in this application?

"A. The deeds were not; none of those lands were included in this present application, and are not in controversy here.

35 "Q. As I understand you, the only consideration that you claim upon your part on account of the lands in controversy here, is your labor and expense in handling and disposing of the same?

"A. Yes, my labor and expense and the further obligation to pay for the lands when the railroad would have obtained title.

"Q. You have not in fact paid anything to the railroad company, either in money or property on account of the lands now in controversy?

"A. I have settled up the country for them. Specific payments for specific sections have not been made, for such payments were to be made only when title would vest in me from the railway company.

"Q. The railway company has not received anything in the way of either property or money given by you to them, on account of the lands here in controversy?

"A. Not under the head of specific payments for specific pieces.

"Q. Has it received either money or property from you in payment for the body of lands now in controversy or for any part of it?

"A. The railroad so far has received from me, no other payments for the lands now in controversy than my labor and expense in settling up the country.

"Q. Now referring to your contracts with the railroad company, do you understand or contend that the railway company by virtue of those contracts could compel you to take the fifty thousand acres of land, or any part of it, if you should decline or refuse to do so?

"A. They could have compelled me to compensate them for all loss and embarrassment which might have come to them by taking the lands from their control during a certain number of years.

36 I had no right to, and never contemplated taking lands from under the control of the railway without taking them finally from the railroad.

"Q. Do I understand you to contend that the company under that contract could legally compel you to take the land and pay for it, or to compensate them for indemnities for not doing so?

"A. Well, I submit the contracts to my attorney, and let it speak for itself. I will submit my contracts and all its consequences to my attorney.

"Q. In the various contracts issued by you to the purchasers from you, except the so-called breaking contracts, the contract receipts for a certain amount as cash paid down, at the execution of the contract, those receipts are correct, and the amounts so stated as paid were actually paid to you by the respective purchasers, were they not?

"A. Yes.

Ireland then introduced as a witness in his behalf, JAMES STODDARD, who being duly sworn testified as follows in answer to questions propounded to him by Ireland's counsel as herein set forth:

"Q. State your name, place of residence and occupation?

"A. James Stoddard; St. Paul; chief clerk of the land department of the St. Paul, Minneapolis & Manitoba Railway Company.

"Q. How long have you been in the employ of said company?

"A. Nearly fifteen years.

"Q. Were you employed in the office of said company, when the so-called Ireland contracts of 1883 were executed?

"A. Yes.

37 "Q. And are you familiar with that contract?

"A. I have a copy of it on file in my office.

"Q. Have your duties been such as to make you familiar with the transaction had in relation to lands embraced in said contract?

"A. They have.

"Q. Has said company ever sold any of the lands embraced in the pending application of John Ireland to any other person than Ireland, and would you have known the fact if there had been?

"A. They have not. My duties are such that I would have known if any contract had been issued.

"Q. What was the general understanding among the employees of said company respecting the status of these lands?

"A. They were considered Ireland's lands.

"Q. Is there in use in the office of said company any map or diagram showing what are known as Ireland's lands?

"A. There is.

"Q. Have you the original map with you? If so please allow it to be examined and we will offer a copy in evidence?

(Copy of original map shown witness marked Exhibit "H.")

"Q. By looking at that map you can tell us in what township and range the so-called Ireland's lands lie?

"A. Yes, sir. Town 123, range 45; town 124, range 45; town 125, range 45; town 126, range 45; town 124, range 48; town 125, range 46; town 126, range 46; town 125, range 47; town 126, range 47.

"Q. What do you understand by these notes?
"A. It shows the status of the land."

38 Witness here identified Exhibits "G" and "D," the originals of which he testified belong to and were part of the files of said railroad company.

Defendant objected to each of the questions and answers propounded to and given by witness Stoddard as irrelevant, incompetent and immaterial; also that in so far as he undertook to state and give the general understanding of the employees of said company as to Ireland's rights to lands embraced within said contract of 1880 and 1883, such testimony was hearsay and incompetent; also in so far as witness testified as to facts or matters contained in the records and files of said company relating to said contract and lands described therein, from his memory of such data, the same is incompetent and hearsay, such records and files being the best evidence of their contents.

Said Ireland then introduced witness JOHN P. O'CONNOR in his behalf, who being duly sworn testified to questions propounded to him by Ireland's counsel as herein set forth:

"Q. State your name, place of residence, occupation.
"A. John P. O'Connor, St. Paul, Minnesota. Secretary to John Ireland.
"Q. Are you familiar with the contracts between Ireland and the railroad company, which have been filed in evidence in this case?
"A. Yes, sir.
"Q. What connection have you had if any, with the sales or executions of contracts by and between John Ireland and the persons to whom he has sold or agreed to sell any of the lands here in controversy?

39 "A. Both of those contracts were written out by myself, and nearly all of them passed through my hands, for the purpose of recording in our books.
"Q. In the performance of your duties as secretary to John Ireland have you kept a record of the sales, by and between John Ireland and the parties to whom he has conveyed or agreed to convey lands?
"A. Yes, sir.
"Q. Can you state either from memoranda in your possession or from memory the names of persons to whom John Ireland has sold or agreed to sell portions of the land here in controversy?
"A. Yes, sir.
"Q. Will you please give the names of the parties to whom such sales were made together with description of lands sold to each?

(Here follows descriptions of certain tracts of land embraced in Ireland's contract of 1883, together with the names of persons to whom he had contracted the same, but not including the land described in the complaint herein, nor the name of said defendant.)

"Q. What is this book you have relied upon for the statements you have just made?

"A. This is the book kept by me for Archbishop Ireland in the office.

"Q. It has been shown by the testimony of claimant Ireland and witness Stoddard, that these contracts between Ireland and the railway company were closed up as to certain lands, embraced therein, which had been conveyed by the United States, for the benefit of the railway company, and in some instances, deeds issued by the company. Do you know whether in any such cases, John Ireland had issued quit claim deeds to parties designated by him as
40 purchasers, and to whom contracts or deeds were issued by the railway company?

"A. Yes I do. I wrote them out and had them acknowledged.

"Q. Under what circumstances were quit claim deeds executed?

"A. Many of the purchasers from Ireland, having gotten deeds from the railroad company through Ireland, came to us and stated that in making loans on their property, they were held back by a cloud of title on their lands, which could only be satisfied by a quit claim deed direct from Ireland. And so we gave them the quit claim deeds.

On cross-examination by defendant, witness O'Connor answered the following questions as herein set forth:

"Q. Are you the same J. P. O'Connor who is the purchaser of a number of tracts of land?

"A. The same.

"Q. How many acres of land embraced in the application did you purchase of Bishop Ireland?

"A. About 7,700 acres.

"Q. I would like to enquire the date and class of the contract issued upon section one, town 125, range 46 to yourself.

"A. I could not give you any date. I have no record of the dates of issuance of any contracts here.

"Q. As to the class can you say whether it was that known as number one, two or three?

"A. It was a modified form of number one.

"Q. What does that mean?

"A. Well, there was a consideration in it, and the railroad company's name did not appear in the form as often as it appears in the original form number one.

41 "Q. Is it a breaking permit?

"A. No.

"Q. Have you a sample of the form in your possession?

"A. Not here.

"Q. Is that one in your hand?

"A. This is not the form of contract under which I bought land.

"Q. Was there a form used expressly for the land that you bought of the bishop?

"A. There was some printed forms, some which we ordinarily bought from supply houses; the writing on those forms, filling out of those forms varied under certain conditions.

"Q. Would you be willing to furnish a sample copy of the form in question to be placed in evidence in this court?

"A. I would not wish to do anything that might jeopardize my claim without consulting my own attorney.

"Q. Then you decline to allow the sample copy to be used, in this case do you?

"A. I hold all my papers, protect my own claims, and will not produce them until necessary.

"Q. In other words until you have to?

"A. I decline to answer.

"Q. When and what class of contracts was issued upon N. E. ¼ of section 7—125–46?

"A. A contract known as number two contract.

"Q. When?

"A. The date of issue of those contracts I do not vouch for, being the exact day it was in December, 1880. My date refers more to the cash receipts of our office. Sometimes the contract is
42 signed in St. Paul, and sent to Graceville, and the contract might bear the date of the time it was made in St. Paul, and my book would show the date of the receipt of money for that contract.

"Q. Can you give the class of contract and the date issued upon S. W. ¼ of section 33—126—45?

"A. That is a similar contract to the one described in answer to the contract covering the S. W. ¼ of 1—125—46.

"Q. Were those contracts which were issued to the bishop's secretary, yourself, peculiar to themselves?

"A. I think I shall decline to answer any questions relating to John P. O'Connor personally in relation to his purchases for the reason that my attorneys are not here to protect me in any rights I may have, and which I think I have.

"Q. Then any question that may be asked you with reference to the seven thousand or more acres of land that you have bought from the bishop you decline to answer?

"A. I decline to answer for the reason that I fear I may jeopardize my claim as stated before without consultation with my attorneys.

"Q. You mean by that, that you would like to consult your attorney as to what your answers should be?

"A. I mean just what I said.

"Q. You even refuse to give us the date of your purchases?

"A. I refuse because my dates cover several years, and I cannot designate those dates off hand.

"Q. Will you tell us whether you made those purchases in the interest of yourself, in good faith, or for the interest of the bishop or some one else?

"A. I do not know really whether I should answer or give
43 precise information, and I always try not to do so, in giving the date of the contracts to others than the parties directly

interested, by not doing so I fear that I might jeopardize those claims, for I have known of many inquiries coming to me from parties either contesting claims or pretending friendship for the parties who hold contracts from us, and proved themselves friends of the contestants; and for that reason I do not wish to give any further information on any claims sold by John Ireland except to the claimants themselves or their proper attorneys or representatives.

"Q. Will your answer to inquiries as to all of the other tracts which you claim to have purchased from Bishop Ireland be the same as the answers given in response to the interrogatories propounded by Mr. O'Hair in his cross-examination?

"A. Practically the same.

"Q. When you said in cross-examination that you declined to answer as to any of these lands, which it is shown by the evidence you purchased from Ireland, did you mean to say that you would decline to answer as to those tracts generally, or merely as to your own connection therewith as purchaser?

"A. My answer was intended to cover all personal purchases I made myself.

"Q. This is a sample (paper handed witness) of what is known as contracts number two?

"A. Yes.

"Q. Were these contracts number two issued under the first or second contract of Archbishop Ireland with the railroad company?

"A. They were issued under both contracts as during the time covered between the lapse of the first contract and the renewal of the second, and were issued down as late as 1889.

44 "Q. Do I understand you to say that some of these contracts known as number two were issued during the life of the first contract of John Ireland with the railway Co., that has been offered in evidence?

"A. I have just stated that they were.

"Q. When were those contracts, number one, issued? During the time of John Ireland's contract with the railway company dated July 17, 1880 was in force, or afterwards?

"A. Most of those contracts were issued before any contract was made by Ireland and the railroad company. Some before and some during the life of the first contract.

Ireland's counsel objected at the time to each and all questions and answers propounded to witness O'Connor by plaintiff, or his attorneys, and to witness's answers thereto, concerning the claim of witness O'Connor to any of the lands embraced in Ireland's application to purchase, for the reason that the claim of witness is not in question, which objections were duly recorded.

Defendant states that the foregoing testimony of Ireland, and of his witnesses together with the several instruments of writing and contracts filed by him as proof and exhibits as herein set forth and referred to, constituted all of said Ireland's proof made and offered

by him in support of his said application to purchase, which testimony, evidence and proof were duly heard and recorded by said United States commissioner under his authority aforesaid and at the time aforesaid. That thereupon said Ireland rested his case.

That defendant, —— ——, at said time and place offered the following evidence in support of his settlement and homestead
45 rights to the tract of land involved in this case, as well as in support of his protest then and there filed by him against said Ireland's right or claim to said tract under his said application to purchase, or otherwise.

That said defendant —— —— introduced and had filed and recorded a stipulation entered into in behalf of said defendant and Ireland by their respective attorneys dated January 21st, 1897, defendant —— —— being represented therein by Stockslager & Heard, his attorneys, and Ireland being represented therein by Charles H. Babbitt, his attorney, which stipulation is in words and figures as follows, to-wit:

STOCKSLAGER & HEARD'S EXHIBIT "A."

"In the Matter of the Application of JOHN IRELAND to Purchase the Tracts of Land, Hereinafter Mentioned and Described, under and Pursuant to Section 5 of the Act of March 3rd, 1887.

And the said John Ireland stipulates and admits that the several statements and claims made by the said parties respectively, whether in their original applications, and being thereunto duly authorized by law, proceeded or as made, set forth, or advanced before S. W. Frasier, Esq., court commissioner of the United States circuit court, at Wheaton, Traverse county, Minnesota, in the above matter of the application of the said John Ireland to make proof in support thereof, are true as to settlement, residence, cultivation, improvements, application, or entries or either of them; and that for the purpose of this hearing, the same shall be considered as evidence in this case.

46 That the said parties were each and all qualified to take homesteads under the land laws of the United States and in each and every case, the said parties made application for and made settlement upon the said several tracts, believing that no valid railroad claim was then existing, and that such lands would ultimately be opened for settlement and entry; and that each of said parties intended to claim, did claim, and do continue to claim the same as a homestead; but the said John Ireland denies that they acquired any rights thereby.

And it is further stipulated and agreed that each of said parties who held and may still hold a contract or contracts from John Ireland, or transfers or assignments of any such contracts, and who has made homestead application for the land embraced therein has done so upon the advice of counsel that neither the railroad company under its grant, or said John Ireland under his contracts with the

company, referred to in his said application to purchase, had or could obtain such claim or title to said several tracts, or any of them, as to secure the said parties or either of them title to said land, or any part thereof as agreed, and that for the purpose of protecting their rights and securing title to their homes they asserted their said several claims under the homestead law, as they were so counseled and advised to do.

It is hereby stipulated and agreed by and between John Ireland and the parties hereinafter mentioned, as claimants for the tracts set opposite their respective names, that at the time the said parties made their respective applications, or made settlements on the said several tracts, so claimed by them and each of them, it was known to each of them, that the said tracts were then under a withdrawal for railroad purposes under claim by the railway company as indemnity lands; except such claimants as made settlement or application to file subsequent to the date when the revocation of said indemnity withdrawal becomes effective.

47

And it is further hereby agreed by and between the several parties in interest, that where there is a variance in dates between the allegation of settlers made by applicants for entry in connection with their applications, and the allegations admitted at this hearing the sworn statements of the parties shall be accepted as the facts for all purposes of this hearing.

Dated this 21st day of January, 1897.

CHAS. H. BABBIT.
STOCKSLAGER & HEARD."

That at said time and place said defendant —— ——, with others, and said Ireland entered into an agreement and stipulation before said United States commissioner who then and there entered said mutual agreement and stipulation upon the record of said proceedings as follows, to wit:

"The following stipulation by and between John Ireland by Charles H. Babbitt and Stockslager & Heard, is hereby made and entered into:

"It is hereby stipulated and agreed by and between John Ireland, the applicant to purchase herein, and the several persons whose names follow and such agreement is now made a part of the record, viz: That the matters and things set forth in their several protests now here filed may be taken and considered as their several claims or statement of facts in their cases respectively in so far as relates to the negotiations to enter settlement, residence and improvements upon the land obtained by each of said parties, 'made, set forth and advanced' at this hearing.

48

"The said applicants now here file their several protests together with a description of the land claimed by each under their several homestead applications, viz:"

(Then followed the name of the said defendant herein and opposite to his name the description of the land in the complaint and first herein above described with a reference to his protest as an ex-

hibit, also the names of other protestants with the description of land claimed by each.)

"Comes now S. M. Stockslager and submits the above and foregoing several protests together with the enclosures as the answer of each and all of said homestead applicants to the citation of John Ireland the applicant to purchase herein to show cause why he should not be permitted to purchase said several tracts of land or either of them, and also the claim of each of said applicants to the lands in controversy as fully set out in said protests.

Under the stipulation filed herein, marked Exhibit "A," of Stockslager & Heard, the affidavits and other papers on file with said other applications above referred to are also to be considered in evidence as a part of the case of each of said applicants. Papers on file are to be considered."

49 That said defendant then and there offered in evidence and had duly filed and recorded his written protest hereinbefore referred to against Ireland's said application to purchase the tract of land involved herein, or otherwise to claim the same, in which protest was a description of the land in the complaint and first described in the answer herein, and which stated and claimed, among other things, as follows:—

That the said defendant protested against the said application of said Ireland to purchase said tract and that said defendant —— —— was qualified to make homestead entry thereof and had filed his homestead application by which he claimed said tract as a homestead and had made valid settlement thereon and had resided thereon ever since the date of such settlement and had made the improvements on, and the cultivation of, said land and had tendered the fees for homestead entry.....
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.....—all on the dates, in the manner and as hereinbefore stated in the answer herein, and further claimed, in effect, that said Ireland was not a *bona fide* purchaser of said tract from said St. Paul, Minneapolis & Manitoba Railway Company under section 5 of the congressional act of March 3d, 1887, so as to entitle him to purchase said tract from

50 the United States; that said Ireland never purchased or contracted to purchase said tract from said railway company by any valid contract of sale or purchase and that his alleged contracts with said company dated July 17, 1880 and March 30th, 1883, respectively, upon which he based his said application, were utterly invalid and insufficient to convey or confer any title to said land upon him, of any kind, and that the claim and title of said railway company to said lands had been duly cancelled and rejected by the Interior Department, (as hereinbefore stated in this answer), where-

upon said lands immediately became subject to the said defendant's homestead application, which said defendant —— —— asked might be allowed, and that Ireland's application to purchase be denied.

That the foregoing stipulations and protest were all the evidence offered by defendant —— —— whereupon he rested his case.

That said United States commissioner having as aforesaid, taken and recorded the said evidence of Ireland and said defendant, the said witnesses having duly signed their testimony as herein set out, after being duly sworn by said commissioner at the time and place aforesaid, in due time forwarded to the register and receiver of the United States land office at St. Cloud, —— Minnesota, a full and correct record of all of said proceedings had before him as herein set forth, duly authenticated, attested and certified by him as such United States commissioner to be a full and perfect record of all of said proceedings.

That in due time said register and receiver, having received
51 said record and proceedings as taken and recorded by said United States commissioner, as aforesaid, and being thereunto duly authorized by law, proceeded to consider and try said cause as certified to them as aforesaid, and on March 16, 1897, rendered their decision therein, by which they sustained and allowed Ireland's said application to purchase the tract in controversy, and rejected and refused to sustain said defendant's protest against the same, but rejected and disallowed all claim made by said defendant —— —— to said tract under his said settlement and homestead application aforesaid.

That in due time said defendant —— —— appealed from said decision to the Commissioner of the General Land Office in strict accordance with the rules of the Land Department governing appeals in such cases.

That said register and receiver, in pursuance of defendant's said appeal, forwarded the same together with their decision and the said record of proceedings had between said Ireland and this defendant before said United States commissioner as hereinbefore set forth, to the Commissioner of the General Land Office.

That in due course of business said Commissioner of the General Land Office proceeded to examine and try said cause between said defendant and said Ireland, on the record aforesaid, and on February 3, 1898, rendered his decision thereon, wherein he sustained and allowed said Ireland's application to purchase, and rejected and disallowed said defendant's protest against the same, as well as all claim made by said defendant —— —— under his said settlement and homestead application. Said Commissioner's decision is in words and figures as follows, to-wit:

52 "DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 3, 1898.

In re Application of JOHN IRELAND to Purchase Certain Lands under the 5th Section, Act of March 3, 1887, and Protests of Adverse Claimants.

Register and receiver, St. Cloud, Minn.

SIRS: This controversy arose upon the application of John Ireland to purchase certain tracts of land under the 5th section of the act of March 3, 1887 (24 Stat., 556), providing for the adjustment of railroad grants, against the granting of which certain settlers filed protests contending that Ireland has no right of purchase, and if such right exists, it is subordinate to their rights as settlers, under the provisions of said section.

The tracts in controversy are within the indemnity limits of the grant to aid in the construction of the railroad now known as the main line of the St. Paul, Minneapolis and Manitoba railway, and at the date when the withdrawal became effective they were free from any adverse claim or right. While the withdrawal of said lands from settlement and entry continued in force they were selected by the railway company as indemnity for losses within the main line, but said losses were subsequently withdrawn and the railway company substituted therefor lands within the limits of the grant for the St. Vincent extension of said railway. These selections were pending before this office, on October 23, 1896, when they were cancelled and the lands restored to settlement and entry, subject to such rights as might have been acquired under the act of March 3, 1887, *supra*.

Upon the cancellation of said selections, Ireland, who had previously made application to purchase the lands in controversy
53 under the 5th section of said act was allowed to make proof of his right of purchase after the usual period of publication, and service of notice on all parties having claims of record, at which time protests were filed against his right of purchase by the several adverse claimants who also submitted testimony as to their right to make entry of the tracts, respectively claimed by them.

A hearing was had before you, and appeals were taken from your decision in the case which, with the record therein was transmitted with your letter of May 15, 1897.

The claim of Ireland of the right to purchase said land under the 5th section of the act of March 3, 1887, is based upon two written agreements entered into between him and the railroad company, one dated July 17, 1880, and the other March 30, 1883.

The first contract gave to Ireland "until the 31st day of December, 1881, the sole and exclusive right and authority to place settlers upon, and of making sales or agreements of sale to parties desiring to settle upon or to purchase the same of all those tracts and parcels

of land situated in the counties of Big Stone and Traverse in the State of Minnesota," described in a schedule attached to said agreement, and as having been selected by said company as indemnity under its grant."

(Here were recited and inserted paragraphs three to six, inclusive, of contract between said Ireland and the railway company, dated July 17, 1880, a copy of which is hereinbefore set out in full.)

"An additional list of lands was afterwards included in the contract and it was then further stipulated that in cases where any person had obtained any right or claim to the lands embraced
54 in the second list by virtue of settlement or license from the company that such right should be respected by Ireland.

The following is a copy of the second contract:"

(Here was recited and inserted the contract between said Ireland and the railway company, dated March 30, 1883, a copy of which is hereinbefore set out in full and marked "Exhibit C.")

"Prior to March 30, 1883, and subsequent to the execution of the first contract, Ireland acting under said contract located a number of settlers upon lands covered by the agreement and gave to said parties respectively a receipt and obligation in the following form:

"Catholic Colonization Bureau.

No. 43. ST. PAUL, MINN., *March* 30, 1883.

The receipt of one hundred and four and $\frac{32}{100}$ dollars from John P. O'Connor, of ——, is hereby acknowledged.

This sum is to be applied as part payment upon the S. W. $\frac{1}{4}$ of section No. 1 in township No. 125 N., of range No. 46 W., of the 5th principal meridian, containing, according to United States survey, one hundred and sixty x-100 acres—the above sum being one-tenth of the principal and one year's interest on the remainder.

The undersigned promises to secure for the said John P. O'Connor, a contract in due form for the land herein described from the Saint Paul, Minneapolis and Manitoba Railway Company, so soon as said railway company will have perfected its title to the lands situate in Bigstone and Traverse counties, State of Minnesota, now known
55 as "indemnity lands;" and, in case these lands instead of accruing to the railway company should hereafter revert to the United States Government, the sum above acknowledged will be returned to the said John P. O'Connor.

JOHN IRELAND."

The amount of money receipted for in each case was ten per cent. of the principal sum and in some cases one year's interest additional which Ireland says—he required the purchasers to pay to bind the bargain and that it was not received by him as his per cent. for expenses and commissions for the sale of the lands. But no part of said sum so received has ever been paid to the railway company, nor has there been any accounting between Ireland and the railway company of any indebtedness growing out of said transaction.

After the execution of the second agreement Ireland entered into contracts with various other parties for the sale of other lands covered by both agreements in which it was stipulated in consideration of certain sums, therein agreed to be paid, that whatever the railway company should obtain title to the property described in said contracts and the purchaser shall make all the deferred payments, at the time and manner agreed upon the said Ireland will convey, or cause to be conveyed to the purchasers named in the respective contracts the lands therein described.

These contracts were made in various forms but in all of them a cash payment of part of the purchase money was required and the balance was covered by notes which were to mature at stated periods after the issuance of patent to the railway company, and in the event that the land should be conveyed by the United States to any
56 other person than the railway company, so that Ireland would not be enabled to convey or cause said land to be conveyed to said purchasers the money so received by him, was to be refunded and the contract to become void.

Omitting for the present all references to the question of priority by virtue of settlement rights, the foregoing are substantially the facts disclosed by the record upon which the right of Ireland to purchase under the act of March 3, 1887, must depend.

It is apparent upon the face of the instrument that the first agreement entered into between Ireland and the railway company merely constituted him an agent, and invested him with authority to locate settlers upon the lands embraced in the schedule attached thereto, and to make sales and agreements of sales to said parties and to pledge and bind the railway company to make titles for said lands, whenever it should obtain the title from the Government.

It was expressly stipulated in the contract that he was to have the sole right to make sales of the lands embraced in the schedule at a certain price named in the contract for which he was to receive a certain per cent. on the gross amount of such sales as compensation for his services and expenses, and as soon as the railway company should obtain title to the lands from the Government, he was to transfer to it all such agreements, and thereafter the land commissioner of said company was to enter into an agreement of sale with such purchasers and to convey to them directly the title to the lands respectively bargained for. It was not contemplated by the agreement between Ireland and the railway company, or by any agreement made between Ireland and the purchasers, that they should derive their title through Ireland, or that he was to be obligated to them in any manner whatever, except as agent of the com-
57 pany to secure the sales, and to turn over the contracts to the company whenever it should acquire title to the land, that the sales might be perfected by contracts to be entered into by the land commissioner in the name and on behalf of the company with the several purchasers for the respective tracts.

The sub-agreements entered into between Ireland and the pur-

chasers do not indicate any purpose or intention whatever on their part to look to Ireland as their grantee but on the contrary they clearly show that the purchasers dealt with him solely as agent of the company authorized to receive from them the part payment of ten per cent., and to bind the company to make them a good title to the land, whenever it should obtain title from the Government, or in default thereof to return the money.

Nor was this relationship changed by the second agreement entered into March 30, 1883, for whatever may have been the intention of the parties to said agreement as between themselves, they could not by any subsequent contract, or by enlarging the powers and privileges granted to Ireland under the first contract, defeat or in any manner impair the rights which the purchasers acquired under their contract with Ireland acting under the powers conferred upon him by the railway company under the agreement of July 17, 1880. This contract gave him authority to make contract for sales, binding the company to complete such sales with the purchaser whenever it should acquire the title, and to convey the land to such purchasers directly, and not through an intermediate grantor. The part payment was not made to Ireland on his individual account, because he had no authority to receive any payment for the land in his individual right, but it was made to the company through its duly authorized agent, and it was bound to refund the money
58 to them, if it failed to make good the title to the land. Neither Ireland nor the company had the authority to substitute or interpose a different grantor, without the consent of the purchaser, or to shift the responsibility for the return of the purchase money, from the obligor with whom they originally dealt.

It follows that Ireland is not a purchaser from the railway company within the meaning of the act, as to those lands for which contracts of sale were entered into under the agreement of July 17, 1880, and is therefore not entitled to purchase said lands from the Government under the provisions of said act.

As these purchasers had the absolute right to compel the railroad company to convey to them the tracts respectively bargained for whenever it should acquire title, they are of the class of purchasers contemplated by the 5th section of the act of March 3, 1887, and as the company's title has failed they are entitled to purchase said land, directly from the Government at the price named in the act.

But while they have the right under the act to purchase from the Government by reason of their purchase from the railway company, they are not bound to exercise this right in order to obtain title to the land, but may avail themselves of the benefit of the homestead law if they are qualified to make homestead entry, and there is no superior or prior settlement right in another. When these selections were canceled, the lands were restored to settlement and entry by any qualified applicant under the homestead law, subject to any existing right of purchase under the 5th section of the act of March 3, 1887. The conferring of the right of purchase upon a settler did

not deprive him of the right to make homestead entry, but
59 he can only avail himself of this right when there is no one claiming adversely to his homestead application under a prior settlement right.

By the agreement of March 30, 1883, the relationship between Ireland and the railway company was changed and all contracts made by him thereafter with purchasers for the sale of such lands were made under the authority conferred by that agreement.

It was clearly the purpose of the railway company to enlarge the powers granted to Ireland under the first agreement by giving to him, under the second agreement, the privilege and right to purchase for himself or for such parties as he might designate any or all of said land to the extent of 50,000 acres instead of a mere power to make agreements for sales at a stipulated price per acre for which he was to receive as his compensation a certain per cent. on the gross amount of sales.

That this conclusion is justified by the facts it is only necessary to revert to the evidence before the local office. John Ireland himself testifies that his former agreement had expired, and that he desired another agreement, which we are to infer should be a new and independent agreement containing more authority to him from the railroad company, and which should protect him as a purchaser. His language is: "I have been to a large expense inducing immigrants to settle on these lands, and now propose another agreement. I will buy myself a large quantity of those lands, holding them as my own."

By reference to the new agreement, we find the language to be: "It is now agreed between the railroad company and this Rev. John Ireland, that when title to these lands *are* acquired by the railroad company, and notice of same is given to Rev. John Ireland, he shall have the privilege and right at any time within sixty days
60 of said notice of purchasing for himself or for such parties as he may designate," etc.

The company not having acquired title from the Government could do no more than execute its agreement to convey title when it should obtain it, otherwise it would have been in the power of Ireland to receive a conveyance at once. He received at the time all that the company could give. Nor was he required to make payment of any part of the purchase price, until it was in the power of the company to convey.

To ascertain what was the understanding of the railroad company in regard to the relation of John Ireland, whether as principal or as agent in this second agreement we find in the evidence of James Stoddart, the chief clerk in the company's land department, that the lands were known as "the John Ireland's lands," and so referred to upon the map. It is also in evidence that James B. Powers, land commissioner of the company, said to Ireland, "the lands are yours, I hope you will make $200,000 out of them."

That the company acted upon this understanding is shown by the communication addressed by it to John Ireland on March 28,

1889, and in which he was notified that it had obtained title to some 26,000 acres of the land embraced in his agreement of March, 1883, with the company and requesting him to make designation. This was followed by the reply of Ireland that he would accept some 16,000 acres, and would release the remainder, which was done by quit-claim deed, sent him by the railroad company, and when executed by Ireland accepted by it.

That intending purchaser dealing with Ireland as to these lands mentioned in the second agreement recognized and dealt
61 with Ireland as a principal and as owner of the lands is shown by the form of agreement entered into between themselves and Ireland, a brief extract of which is as follaws:

"This agreement made and entered into this 25th day of April, A. D. 1891, by and between John Ireland of the city of St. Paul, Minnesota, of the first part and John Burns of Big Stone county, Minnesota, of the second part.

Witnesseth, that the said party of the first part in consideration of the covenants and agreements of said party of the second part hereinafter contained, hereby sell and agree to convey unto said party of the second part or his assigns by deed from St. P., M. and Manitoba R'y Co., upon the prompt and full performance of said party of the second part of his part of this agreement the following described premises," etc.

It is stipulated by and between counsel for the several parties to these proceedings that the parties executing the several agreements attached to the stipulation understood and believed the lands to be included in the grant to the railway company, and that the company had the right to sell, and that John Ireland had the right to sell and that good title was being acquired by such agreements of purchase, and that any payments made to said Ireland were made in good faith as purchase price.

It is contended by counsel for protestants that this agreement is a mere unilateral or option contract without consideration, which cannot be enforced either in law or equity, and is illegal for want of mutuality of obligation.

It is also contended that it is simply an option or privilege to purchase an undescribed float of 50,000 acres to be selected from
62 a larger quantity, and that such a contract cannot be enforced unless these particular tracts can be identified.

Construing this agreement in the light of the original agreement, it is evident that the inducement for granting to Ireland such a privilege was the benefit that would flow to the company by the settlement of its lands by which the traffic of the company would be materially enhanced. This was to be accomplished through the effort of Ireland, and as he had located parties on several of the tracts in controversy and had entered into agreements with them for the sale of such lands which could not be consummated because of the failure of the company to secure title to the lands, before the expiration of the agreements, it entered into the second agreement which conferred upon him the privilege and right at any time

within sixty days after notice that the company had acquired title to the land of purchasing, either for himself or for such person as he may designate any or all of the lands embraced in the schedule attached to the first agreement not exceeding 50,000 acres. Under this agreement he had the privilege of contracting for the sale of any or all of said lands to any party or parties he might choose and at such price or profit as he could make, accounting and paying to the company the sum of $4 per acre less ten per cent. on such sum which was allowed under the first agreement and continued under the second. Ireland could at any time after the execution of this agreement have identified the particular tracts by taking possession thereof either in person or by others for whom he was authorized to purchase under his agreement, and the payment of a part of the purchase money, made by himself to the company for any designated tract or tracts, or by others made under a contract for the sale of a
63 specific tract, or the development and improvement of any specific tract either by himself or by others under contracts made with him would be sufficient identification of the land he intended to purchase and such part performance as would bind the company to convey provided he should make his selection to purchase and consummate the sale at any time within sixty days after receiving notice that the company had acquired title to the land. Protestants argue that there is no consideration. This office holds that it is sufficient for Ireland to show that he was a *bona fide* purchaser from the railroad company. As the determination of this question depends largely upon the construction to be placed upon the fifth section of the act of March 3, 1887, that section is here quoted as follows:

"That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns."

It is apparent that the act was intended for the relief of persons who had in good faith purchased or who had contracted with the railroad company for the purchase of lands coterminous with the constructed parts of said road, and who upon the faith of the
64 obligation of the railroad company to make title to the land whenever it should acquire it from the Government had given either a good or valuable consideration therefor, such as the payment of all or any part in cash, or the development and improvement of the land contracted for. Austin *v.* Luey, 21 L. D., 507. Grandin *v.* Lebar, 23 L. D., 311. A party may also be sustained in his claim

for relief when no such consideration is shown, providing it shall appear that he contracted in good faith with the railroad company.

Although the contract was made with the understanding that it was conditioned upon the acquisition of title by the company which might never happen, it does not impeach the good faith of the purchaser.

In the case of United States *v.* Winona & St. Peter Railroad Company, 165 U. S. 465, the court, with reference to this section of the act, says: "It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands as not conveyed and for any reason excepted from the operation of the grant indicates that the fact of notice of defect of title was not to be considered fatal to the right." It was, therefore, held to include one, "who if not in the fullest sense a *bona fide* purchaser, has nevertheless purchased in good faith from the railroad company."

Nor does the mere fact that the agreement was not executed with the technical formalities required by the laws of the State defeat the right of purchase under the act.

There can be no doubt that a *bona fide* purchaser from the railroad company who afterward sold or assigned his right to another is entitled to purchase the land under the fifth section of the
65 act, as against the assignee, because the act clearly contemplated that the relief granted should be enjoyed by the purchaser equitably entitled to it, and this was the rule that controlled the McKinley case, which is cited in support of Ireland's contention. But was Ireland a purchaser within the meaning of the act, although he may not have paid the purchase price? Even admitting protestant's contention that there must be shown some consideration rendered by Ireland in order to constitute him a purchaser in good faith, there is sufficient proof to meet this requirement.

We look to the evidence again and find Ireland to testify that: The consideration was the labor which he had given and was giving to bring settlers along the line of the road and the large expenditures which he had made and was making for the same purpose. This it is assumed was in addition to the cash price contemplated by the written agreement as shown by other evidence in the case.

In view of the conditions heretofore mentioned, the cash consideration mentioned in the written agreement could not be paid at the time because under the terms of the contract it was not to be paid until after the company had received title, which as to the large body of lands embraced, it never acquired. To require a payment of the cash consideration under such circumstances, and where every other condition had been complied with would defeat the very purposes for which the act of March 3, 1887, was enacted; and would be manifestly unjust. The object of the act, it must be remembered, was to give purely equitable relief to persons who had contracted for the purchase of lands within railroad limits, and where such persons

had in good faith entered into such contract. The language
66 of the act is that, "it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands."

Even though John Ireland paid or rendered no such consideration to the company, that fact should not defeat his remedy, as it was the intention of Congress to afford relief even where the evidence showed no more than an agreement of purchase, and by a *bona fide* purchaser, evidenced by such consideration as would show good faith. No payment in advance is required by the act. Did the railroad company sell to John Ireland provisional on its acquirement of title? Was John Ireland a *bona fide* purchaser? These are the two requirements in contemplation of the law. As to both of these, I must conclude that Ireland has fully shown himself qualified. The railroad company recognized his *bona fides* and so dealt with him. The settlers or purchasers from and under him recognized and dealt with him as a *bona fide* purchaser. His written contracts are in evidence of this. He also expended time and means in settling the lands. What more was necessary under the law provided for such cases? It is argued by counsel for protestants as if these contracts must be construed in their technical meaning as usual in courts, but this is not the rule to be adopted in this class of cases where relief is asked under the act of March 3, 1887. The department has in some cases granted relief under this act where indeed there was no written agreement or contract of sale. In still other cases relief has been granted, where no payment has been made as mentioned in the contract. The honorable Secretary of the Interior in the case of Austin *vs.* Lucy (21 L. D., p. 511) uses this language as indicating the broad and liberal scope in which the act is understood and construed by the department: "Obviously
67 the terms purchase and sale, as used in said act are not to be understood in their technical and limited meaning, but rather in their widest and most comprehensive meaning, which would, I think, include such contracts for the sale of lands, as had been performed in whole or in part by the purchaser, or as had resulted in the occupancy and improvement of the lands, no matter how such contracts were evidenced, so that they were clearly and satisfactorily proven."

The Supreme Court has said in 91 U. S., page 374: "The word is employed in a sense not technical, only, as meaning acquisition by contract between the parties." Reverting again to the question of consideration, enough is disclosed by the evidence to justify the conclusion that, if needed, this requirement has been met.

Would Ireland by failure to secure relief suffer loss? That he placed the settlers upon many of the lands embraced in the contract, at much trouble, time and expense to himself is not denied. Has he not upon this basis an equitable right? Reference is also made to the Campbell case, decided in 8 L. D., page 27. In this case no payment has been made, and no credit had been given for breaking, and yet relief was extended to the applicant upon showing that he

had improved the land. This was regarded as evidence sufficient to prove his *bona fides* so as to entitle him to relief. In this case the department announces that the act "is a relief statute and should be liberally construed, so that it may not fail in its object, and that equitable rights may be protected." If it may be said that Ireland himself did not occupy the land or did not improve or break the soil, it may be replied that these acts were performed by those who were placed there by him and who represented him.

68 The contract recognizes Ireland's assignees, and it was these who were placed on the lands by him, and it was they who occupied and improved the lands, under their contract with him. Their acts so far as constituting elements of consideration in the sense required by protestants, may be taken to be the acts of John Ireland. Regarding occupancy, possession and improvement of the land as an advantage of the company, in reference to its landed interests, and a moving consideration on its part for entering into the contract and assuming that through the instrumentality of the purchaser, such occupancy, possession and improvement of the land is brought about by persons seeking to acquire by purchasing from him his rights acquired from the company under his contract, it appears to me that it should be regarded as a consideration sufficient to sustain the contract in an equitable view of the transaction, such as would be appropriate in a case arising under the remedial act in question.

The words "purchase" and "sale" as used in said act as I have before said "are not to be understood in their technical and limited meaning" as the department has often held, and there appears to be no reason why, if the contract was made in good faith and for reasons satisfactory to the parties thereto, the matter of a consideration paid or passed in the technical and limited meaning should be insisted upon as necessary to entitle the purchaser to the benefits of said section of the act. It would seem that equal liberality of construction should be applied in considering this point as has characterized the rulings in regard to other points which have been passed upon in administering the act. If the company agreed to place itself under obligations to convey the land to the purchaser in consideration of an agreement on the part of the purchaser,

69 placing him under obligation accepted by the company as sufficient, and the transaction is one for the purchase of the land entered upon in good faith on the part of the purchaser, it should be accepted as sufficient to entitle the latter to the benefit of said section 5.

The important point is that of a purchase in good faith. The act in question as before mentioned is remedial in its nature and should be construed liberally in favor of its beneficiaries where good faith appears.

It is sufficient if all the evidence shall satisfy the two requirements. (1) Did the railroad company sell? (2) Was the applicant a *bona fide* purchaser? It is my judgment that these conditions have been satisfied.

Congress wished to protect the equities of the purchasers. As stated by the Attorney General, 6 L. D., 275:

"The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers who through the erroneous or wrongful disposition of the lands in the grants, by the officers of the Government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized."

Nor do I find that Ireland's right of purchase is defeated by any settlement right that was made subsequent to December 1, 1882, and prior to the passage of the act of March 3, 1887, for the reason that all who made settlement upon any of such lands during that period, went into possession under contract made with Ireland for the purchase of said lands, and hence were not ignorant of the rights and equities of others. They do not therefore come within the operation of the proviso to said section. Power *v.* Olson, 25 L. D., 77.

70 Ireland's right to relief being thus recognized, disposes of the adverse application of those who interpose their own rights.

Believing, therefore, in conclusion, that John Ireland brings himself within the necessary requirements, it is my opinion the decision of the local office should be affirmed in his favor in this view of the second agreement of March 30, 1883, and the contracts thereunder, and that the decision of the local office in the same hearings adverse to him and his contracts under the agreement of July 17, 1880, should also be affirmed.

It is so decided. Notify all parties in interest of this decision with usual right of appeal and report at proper time.

Very respectfully, BINGER HERMANN,
Commissioner."

That in due time said defendant appealed from said Commissioner's decision to the Secretary of the Interior in strict accordance with the rules of the Land Department relating to appeals in such cases.

That the Commissioner of the General Land Office in due time allowed and forwarded said defendant's appeal from said decision together with the record aforesaid with his decision appealed from, to the Secretary of the Interior, who, on January 20th, 1899, examined and tried said cause on the record and appeal aforesaid, and affirmed and sustained the Commissioner's said decision, thereby sustaining Ireland's said application to purchase, and rejecting and disallowing said defendant's protest and claim to said tract under his settlement and homestead application. Said decision being in words and figures as follows, to wit:

71 26–450.

"JANUARY 20, 1899.

JOHN IRELAND
vs.
JOSEPH BENNON ET AL.

The Commissioner of the General Land Office.

SIR: This controversy arose upon the application of John Ireland to purchase, under the fifth section of the act of March 3, 1887 (24 Stat., 556), certain tracts of land within the indemnity limits of the grant made by the acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (139 Stat., 526), to aid in the construction of the railroad now known as the main line of the St. Paul, Minneapolis and Manitoba railroad, and is now before the department upon diverse appeals from the decision of your office of February 3, 1898, which sustains Ireland's right to purchase certain tracts embraced in the application, and denies his right to purchase other tracts.

After careful consideration of the matter, your office decision is hereby affirmed. The papers are returned herewith.

Very respectfully, C. N. BLISS, *Secretary.*"

26–449.

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January* 23, 1899.

JOHN IRELAND
vs.
G. E. GOWAN ET AL.

The Commissioner of the General Land Office.

SIR: This controversy arose upon the application of John Ireland
72 to purchase, under the fifth section of the act of March 3, 1887 (24 Stat., 556), certain tracts of land within the indemnity limits of the grant made by the acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), to aid in the construction of the railroad now known as the main line of the St. Paul, Minneapolis and Manitoba railroad, and is now before the department upon diverse appeals from the decision of your office of February 3, 1898, which sustains Ireland's right to purchase certain tracts embraced in the application, and denies his right to purchase other tracts.

After careful consideration of the matter, your office decision is hereby affirmed.

This and the departmental decision of January 20, 1899, in the case of Ireland *v.* Bennon, *et al.*, are intended to dispose of what seems to have been treated as two separate cases, one originating in the Marshall land district, Minnesota, and the other in the St. Cloud district, Minnesota.

Very respectfully, THOS. RYAN, *Secretary.*"

That in due time and in strict accordance with the rules of practice of the Land Department said defendant, on the — day of —— 1899, filed his motion for review of the Secretary's decision aforesaid, which motion for review the Secretary of the Interior examined and considered, and on the 24th day of April, 1899, overruled and disallowed said motion for review and reaffirmed his said decision of January 20th, 1899, which decision on review is in words and figures as follows, to-wit:

73 Vol. 26, Nos. 449–450. F. W. C.

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 24, 1899.

JOHN IRELAND
v.
SETTLERS.

The Commissioner of the General Land Office.

SIR: With your office letters of March 11, and 29, last, were transmitted three separate motions for review of departmental decisions of January 20 and 23, last, in the case of John Ireland *v.* Settlers, involving certain lands in the St. Cloud and Marshall land districts, Minnesota, the several motions being filed on behalf of (1) Peter C. Ringstrom and one hundred and four homestead claimants, (2) William Cox, and (3) William E. Maxwell.

The several motions are denied and herewith returned for the files of your office.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*"

That by virtue of and under authority contained in said Secretary's decisions, the said register and receiver, on the — day of —— 1899, allowed said Ireland to purchase and to pay for said tract of land in controversy, and to enter the same under the laws of the United States.

That in pursuance of such purchase and entry by said Ireland, the officials of the United States Land Department, on the — day of —— 1899, issued to said Ireland a final receiver's receipt and certificate of purchase under section 5 of the congressional act
74 of March 3, 1887, entitling the said Ireland to a patent from the United States of the tract in controversy claimed by this defendant as aforesaid.

That the foregoing are all the proceedings had in the Umted States Land Department in reference to the land in controversy herein.

Wherefore defendant says the Secretary of the Interior, Commissioner of the General Land Office and register and receiver, all committed manifest wrong and error in their said decisions allowing said Ireland to purchase the land in controversy herein, under his said application, and issuing to him said muniments of title for

same, whereby this defendant was and is damaged and illegally deprived of his lawful rights and claims thereto incident to his said settlement thereon and homestead application therefor, made and filed under the homestead laws of the United States.

That said decisions were rendered against this defendant to his injury, and all other acts done thereunder, by which said Ireland was allowed to receive said muniments of title for said tract of land, through misconstruction and misapplication of the law governing said Ireland's right to purchase the same under his said application, which is based on the fifth section of the act of Congress of March 3, 1887 (24 Stats., 556).

That said last-mentioned officials of the United States as shown by their said decisions and the record herein set forth, upon which they are based, repeatedly violated, misconstrued and misinterpreted the rules of evidence applicable to a legal construction and interpretation of Ireland's contract with the railroad company dated March 30th, 1883, relied on by him, as shown by said record proceedings, to prove that he was thereunder a *bona fide* pur-
75 chaser of the tract in controversy from said railroad company, as defined by the said fifth section of the act aforesaid.

Defendant charges particular errors of misconstruction and misinterpretation of the law on the part of said officials as follows, to-wit:

Said contract of March 30, 1883, together with all of the other evidence embraced in said record, upon which said decisions were based, utterly fails to prove that Ireland was, or is, a *bona fide* purchaser of the tract in controversy from said railroad company; but on the other hand said contract and record clearly prove that Ireland never at any time purchased, or otherwise acquired, any interest or right whatever to said tract from said company, to-wit:

First. Said contract contains or expresses no consideration whatever by its terms, as moving from, or promised by Ireland, to said railroad company for any interest or right in the tract in controversy.

Second. Said contract does not by its terms convey, or purport to convey, any present interest whatever in and to said tract to said Ireland; but, on the contrary, said contract only purports to confer upon him a mere option of purchase as to said tract, which option is expressly limited therein for its exercise, upon a formal election to be made by him, upon formal notice to be given him by said railroad company, after it acquired the title of the United States to said land under the provisions of its grant, which title it has never acquired, but to the contrary, all right, title, interest and claim of said company to said tract was rejected, canceled and entirely extinguished by the said decision of the Commissionor of the General Land Office dated October 23, 1896, aforesaid.

76 Third. That said company, as aforesaid, as shown by said record, has never acquired any title or interest in said tract, has never notified said Ireland of any right of election to take the same under his said contract, or otherwise; neither has he ever ex-

ercised any election or given any notice of his intention to elect or take said tract under the provisions of said contract, or otherwise.

Fourth. That, in the absence of consideration expressed or implied in said contract of March 30, 1883, said officers of the United States grievously erred in misconstruing and misinterpreting the law governing such a case, by admitting and considering the evidence of said Ireland as to moneys expended and labor performed by him, executing on his part the prior contract between him and said company relating to this tract, dated July 17, 1880, which latter contract expired by its own terms December 31, 1881, under which he, as found in the said decisions complained of, was employed by said company as its agent to dispose of lands claimed by it, for which service as agent he was to receive a certain commission on the price and consideration received by said company from sales made by him, as its agent.

That, as shown by said decisions and record, said company owed said Ireland nothing on account of services performed by him under said expired contract; and even if it did, said officers grievously erred in considering and holding such antecedent obligation of said company to him under said expired contract, as a legal consideration to support said contract of March 30, 1883.

Fifth. That said officers also erred in admitting and considering said Ireland's evidence as to moneys expended and labor performed by him, in placing settlers upon various tracts embraced in
77 his application to purchase, and otherwise encouraging and contracting with various persons for the purchase of said lands from the said railroad company when it should acquire title to same from the United States, as any legal, valid consideration whatever to support his contract of March 30, 1883, since all such services performed by him were antecedent to the execution and date of said contract of March 30, 1883; hence any obligation on account thereof from said company to him was a past consideration and could not support the subsequent contract of March 30, 1883, as a new and present legal consideration moving from Ireland to the company, or from the company to Ireland.

But on the contrary, said Ireland's evidence shows clearly that the money expended and services performed by him as above set forth were not so expended or performed in pursuance of any obligation whatever contained in said contract of 1883 which required him to do so in the proper performance, on his part, of its provisions.

On the other hand said evidence and record shows that said Ireland incurred such expenditures and performed such services above described strictly in his own interest and for his own use and benefit, to enable him to determine what, if any, of said lands he would desire to elect to take under his said contract, when notified by said company to make his election as before described; it being shown by his testimony and the record, as well as by the terms of said contract, that he was not compelled to take any of it; and it is further shown by the record that said Ireland only claims such parts and portions of said lands described in his said contract of 1883, as he

found that he could profitably dispose of to others for a sum,
78 or price in excess of the $4 an acre, which by the terms of his said contract he agreed to pay said company when it conveyed him title of the United States to the lands he might elect to take.

Wherefore, defendant says that said officers of the United States misconstrued and misinterpreted the law in admitting or considering any of said acts done and performed by Ireland prior or subsequently to the date of his said contract of March 30, 1883, as a legal consideration supporting said contract, wherein no consideration is expressed, no act or condition on Ireland's part to be performed, nothing for him to pay, or do for his privilege or option of purchase, neither was he required to do anything under the contract prior to the date of election he might make; hence said officers erred in sustaining said contract of 1883 as a contract of purchase on an alleged consideration growing out of Ireland's voluntary assumption of obligations, or performance of duties not expressly required by the terms of said contract.

Sixth. Said officers misconstrued and misinterpreted the law in holding in their said decision that any act or thing done or performed by Ireland in connection with the tract in controversy, either before or after the execution of his said contract of March 30, 1883, constitutes in law such part performance of said contract, on his part, as constitutes a valid consideration for said contract, or as showing any legal compliance by him with the terms thereof, because all of such acts done and performed were purely voluntary on his part and not required to be performed by him by any of the terms of said contract.

Seventh. That said officials of the United States further erred and violated the law in their consideration of, and decisions on,
79 said record, by improperly receiving and being governed by, the parol testimony of said Ireland and his witnesses Stoddard and O'Connor, as to the understanding of Ireland and the railroad company as to the legal meaning and effect of said contract of March 30, 1883, and as to acts done by Ireland and said railroad company after the execution of said contract, not embraced within, nor contemplated by, its terms.

Eighth. That said officials of the United States also erred in their said decision by misconstruing the law applicable to a proper legal construction of Ireland's contract of March 30, 1883, by holding that, under its terms, Ireland had any right or authority whatever to sell, contract, or otherwise dispose of, or encumber any of the lands described in said contract, from and after its date; and in holding and deciding that Ireland, in so doing, was in any wise performing any of the conditions of the said contract as to his right of election to purchase, or otherwise, it appearing by the very terms of said contract that his right of election to purchase any or all of said lands, or to exercise any rights in regard thereto, did not attach, or inure to him, until said railroad company had acquired the title of the United States to said land, and had given to him formal notice of his right of election aforesaid.

Ninth. Said officials of the United States having found and decided in their said decisions that Ireland had never paid to the railroad company any part of the stipulated price and consideration for said lands of $4 an acre, agreed to be paid by him to said company when it should convey to him any of such lands as he might elect, according to the terms of said contract, they misconstrued and misapplied the law by holding in their said decision that no
80 consideration was required by the act of March 3, 1887, or the fifth section thereof, to support a purchase, or contract of purchase, contemplated by said section five, or constitute said Ireland a *bona fide* purchaser thereunder, under his said contract of March 30, 1883.

They erred in holding that if such consideration was required by the law, such requirement was complied with by Ireland, by the fact that the railroad company recognized his *bona fides*, and so dealt with him; and by the fact that settlers or purchasers from and under him recognized and dealt with him as a *bona fide* purchaser; and that the written contracts between the company and Ireland are evidence of such consideration; and that Ireland expended time and means in settling up said land.

Tenth. Said officials in their decision misconstrued and misapplied the law applicable to the provisions of said Ireland's contract of 1883, in this:

In holding that said contract contained mutual obligations assumed by Ireland and the railroad company for the purchase by him of said lands from the company and the sale of said lands by the company to him, which mutual obligations were in themselves sufficient consideration moving to and from the respective parties to it, to constitute said contract a valid contract of purchase, and to constitute Ireland a *bona fide* purchaser under said section five.

But defendant alleges that said contract by its terms is wholly deficient in mutuality of obligation as between Ireland and said railroad company. That, while said company agrees therein to convey to Ireland such lands as he might elect upon conditions stated, said contract contains no alternative obligation upon Ireland,
to take or purchase any of said lands, or to elect to take the
81 same or any part thereof, upon notice by the railroad company as aforesaid, or to pay any consideration whatever for the right and privilege of making or exercising such election.

Wherefore defendant says that in said contract held by said officials to be a valid contract of purchase, there is a total absence of mutuality, consideration and alternative obligation, without the presence of which said contract is *nudum pactum* and non-enforcible in the courts of the country against either party thereto, and said officials of the United States should have so held.

Eleventh. Said officials of the United States also misconstrued and misapplied the law in basing their said decisions in favor of Ireland upon former decisions of the Secretary of the Interior in the cases of Campbell, *ex parte*, 8 Land Decisions 27, and 12 L. D. 247; and of Austin *vs.* Luey, 21 Land Decisions, p. 511.

Defendant says that said decisions furnish no reason or authority whatever upon which to base their said decisions in favor of Ireland.

The facts in those cases, as shown by the official reports of the Interior Department, *supra*, shows that Campbell and Austin, applicants to purchase under said section five received from the railroad companies, with which they contracted, written contracts and promises duly executed, agreeing to convey to them respectively designated tracts of land upon acquiring title thereto, for a consideration therein stated.

That, upon receipt of said contracts, said applicants to purchase, entered upon, took possession of, improved and resided upon, as their homes, the tracts designated in their contracts.

That Austin paid to said company the full stipulated price of $2.50 an acre for said tract, lived upon it for twenty years and expended $3,000 in improving it.

82 That Campbell, under the expressed written terms of his contract with the company, as shown in the official report of the Secretary's decision in 12 Land Decisions, 247, broke and cultivated said tract, for which labor the contract provided he should be allowed the sum of $3 per acre; and that the balance of the consideration agreed on of $4 an acre, he paid to the company in cash.

Defendant therefore says that Ireland's right to purchase, based upon his said contract of 1883 and acts done by him outside of its provisions, as set forth by said officials in their decisions in his favor, is not sustained or authorized by the departmental precedents above referred to.

Twelfth. Defendant states that said officials of the United States misconstrued and misapplied the law in their said decisions, in holding and deciding that the Interior Department, or the United States represented by it, was not bound to construe Ireland's contracts with the railroad company, or his dealings with it in connection therewith, or his right to purchase lands thereunder, according to the rules of law as enforced by courts of justice; but that said officials had the right to decide in favor of Ireland's right to purchase under the fifth section of the act of March 3, 1887, on departmental ideas of law and justice, regardless of the legal construction of statutes and laws governing the rights of plaintiff and defendant, as declared and enforced by courts of justice.

Defendant states that said officials, in their said decisions did violate, misconstrue and misapply the laws of the land in all the particulars heretofore mentioned, as well as in others hereinafter stated.

Thirteenth. Defendant further states that said officials in 83 their said decisions improperly and illegally considered evidence contained in said record as to the election made by Ireland in 1889 to take 16,000 acres of lands described in said contract of 1883, out of a list of 26,000 acres of such land, to which said company had acquired title from the United States, of which said company had given Ireland notice, as any legal proof or evidence of an election by Ireland to take any of the lands embraced

in his application, to which the company has never acquired title, and as to which the company has never notified Ireland to exercise his right of election, as provided in his said contract.

Fourteenth. That said officials in their said decisions misconstrued and misapplied the law in holding that the evidence of Ireland showing that he had, subsequently to the date of said contract of March 30, 1883, contracted to sell various tracts of land described therein to settlers and others who paid to Irel.. d, and agreed to pay to him various considerations therefor, and, in addition thereto, cultivated and improved said tracts so contracted to them by Ireland, are legal evidence and proof of a valid consideration for said contract of 1883, moving to the said railroad company from Ireland, to support said contract.

Fifteenth. Said officials misconstrued and misapplied the law governing contracts of purchase of real estate, in not rejecting Ireland's application to purchase, for the reason that said contract of March 30, 1883, failed to describe or identify any particular tracts of land, in and to which Ireland might acquire an interest; but on the other hand said contract purports to give said Ireland a right of election to purchase any part, or portion of 50,000 acres of
84 lands, which 50,000 acres are not specifically described or identified, but are simply referred to as any part of a larger tract of 66,000 acres described in said contract, which he might elect to purchase upon notice to him from the company aforesaid.

Wherefore defendant says that by reason of said erroneous decisions of the officials of the United States in favor of Ireland, by and under which he acquired said muniments of title from the United States for the tract of land in controversy claimed by defendant, he was and is deprived of his lawful rights and claims in and to said tract, based upon his said settlement and homestead application aforesaid.

That said defendant has, in the matter of settlement and residence upon, and cultivation and improvement of and legal application for, said tract of land in controversy under the homestead laws of the United States, in all things complied, and until the date said muniments of title were issued to Ireland, continued to comply with all of the laws of the United States governing his claim to said tract, as well as all the regulations of the Land Department relating thereto.

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Further complaining, said defendant alleges that from a time long prior to the date hereinafter stated the defendant, Minneapolis Trust Company, was, ever since has been, and still is, a corporation duly created and organized under and by virtue of the laws of the State of Minnesota.

That on to-wit, the 16th day of October, 1897, said Ireland executed and delivered to said Minneapolis Trust Company a deed in the form of warranty, dated the 16th day of October, 1897, whereby he purported to convey to said company the land in said complaint and first hereinabove described, with other lands, which said deed was recorded in the registry of deeds of Traverse county, Minnesota, on the 22nd day of October, 1897, in Book K of Deeds on pages 513, 514 and 515; and in the registry of deeds of Big Stone county, Minnesota, on the 21st day of October, 1897, in Book S of Deeds on page 101.

That, although said deed was warranty in form, said land was in fact by it conveyed to said company in trust for said Ireland, empowering said company as agent of said Ireland to dispose of said land, and contemporaneously with the execution and delivery of said deed said company duly made and delivered to said Ire-

86 land its declaration of such trust by instrument bearing even date with said deed.

That said company paid no consideration for said conveyance and at the time thereof had full notice and knowledge of the rights, claims and equities aforesaid of this defendant in and to said land, and that said Ireland had no right, title or interest therein or thereto as against said defendant.

That thereafter, as this defendant is informed and believes, said Minneapolis Trust Company executed and delivered to the plaintiff herein a deed purporting to convey to him said tract of land in said complaint and first hereinabove described.

That said plaintiff paid no consideration for said conveyance and at the time thereof had full notice and knowledge of the rights, claims and equities aforesaid of this defendant in and to said land, and that neither said Ireland nor said trust company had any right, title or interest therein or thereto as against this defendant.

Wherefore, defendant prays the judgment and decree of this honorable court that plaintiff take nothing by this action; that, by reason of said decisions of said officials of the United States and the issuing of said muniments of title to said Ireland thereunder, said defendant —— —— was and is deprived illegally of his said title

and claim to the tract of land in said complaint and first hereinabove described, and that thereby also said Ireland and his grantee, Minneapolis Trust Company and the plaintiff herein, were each illegally vested with such title; that said plaintiff be declared and held trustee of such title for said defendant's use and benefit, and that plaintiff be required by the order and decree of this court to
87 properly convey said premises to this defendant by proper deeds of conveyance, and, in case of his refusal or neglect so to do, that the decree of this court stand in lieu thereof as a conveyance of said premises to said defendant; and that all the said right, title and interest of plaintiff in and to said premises be vested in said defendant and the possession thereof be decreed to him, and for all other proper relief, with judgment against plaintiff for the costs and disbursements herein.

F. W. MURPHY,
Attorney for Defendant, Wheaton, Minn.

STOCKSLAGER & HEARD,
Washington, D. C., and
THOMAS KNEELAND,
Minneapolis, Minn.,
Of Counsel.

STATE OF MINNESOTA, }
County of ——, } *ss:*

—— ——, being first duly sworn, deposes and says that he is the defendant in the foregoing entitled action; that he has read the foregoing answer, and that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and that as to such matters he believes it to be true.

—— ——.

88 Subscribed and sworn to before me this — day of ——, A. D. ——.

—— ——,
Notary Public, —— *County, Minnesota.*

[NOTARIAL SEAL.]

89 *Reply.*

Said plaintiff for reply herein denies each allegation of the answer not hereinafter expressly admitted.

Plaintiff admits that the land described in the complaint was included in the indemnity land grants in aid of the St. P. M. & M. R'y Co. as alleged in said answer, and that all the lands within said indemnity grant including this tract, were withdrawn from settlement and entry, for the purpose of said grant on June 3rd, 1869.

Plaintiff further admits that said railway company failed to obtain title to a large quantity of land within the indemnity grants within the counties of Big Stone and Traverse, in said State, including the

tract in controversy, because in the adjustment of said grant, the same proved to be surplus lands, after said grant was filled, so that the tract in controversy and numerous tracts included in said indemnity grants were ultimately excepted or released from the operation of said grant.

That the railroad of said railway company was constructed in all respects as required by its said grant, and within the time limited; and the tract herein involved was within one of the numbered sections prescribed in said grants, and said railroad was constructed beyond a point coterminous with the location of said tract, before the making of the contracts hereinafter mentioned.

90 Plaintiff further admits that he obtained his title to said tract of land by certain mesne conveyances from the John Ireland mentioned in the answer, and that said John Ireland procured his title to said land direct from the United States under the provisions of the 5th section of the act of Congress of March 3rd, 1887, (Stats. 556) as a *bona fide* purchaser from said railway company.

That the written contracts entered into between the said railway company and the said John Ireland with reference to said lands are correctly printed in said answer the first of said contracts, (except the descriptive list of the lands therein referred to) appears from folios 40 to 50; and the second between folios 54 and 59 of said answer.

That there *was* attached to the first of said contracts above referred to, and belongs with the same, lists describing various tracts aggregating about 50,000 acres, including the tract in controversy, which said lists formed a part of said contract, and the lands described therein was the subject matter of said contract, and also of the second or subsequent contract, above referred to.

That above 32,000 acres of said lands including the tract in controversy, were for the reasons aforesaid, lost to said railway company.

That in 1889, said railway company acquired title from the United States to a part of the lands included within the indemnity grants, to-wit, about 26,000 acres, and of the quantity so acquired

91 there was selected by said Ireland under his purchase of March 30th, 1883, about 16,000 acres, all of which was thereupon conveyed to him by said railway company or to parties designated by him — whom he had re-sold the same as hereinafter mentioned, which conveyance applied *pro tanto* in fulfillment of the purchase by said Ireland of March 30th, 1883.

Plaintiff further alleges that at the time of the purchase of said lands by the said John Ireland, he was a citizen of the United States, and a resident of the city of St. Paul, in said State, and that said lands were agricultural prairie lands wholly unoccupied and unclaimed by anybody except the railway company under its said grants, and were all contiguous in the counties of Bigstone and Traverse, in said State.

That the said John Ireland was then and at all times herein men-

tioned has been an archbishop of the Catholic Church having administrative charge of its affairs throughout the Northwest.

That there was within the large cities and elsewhere within his knowledge a large number of people belonging to his religious denomination who desired to acquire farms and establish homes in western Minnesota in some Catholic community, and that the said John Ireland began his negotiation with said railway company and ultimately purchased the large tract of unoccupied and unclaimed lands above referred to from said company, as a supposed part of its grant, solely for the purpose of establishing a colony
92 thereon of the classes above mentioned. That the price at which said lands were to be sold by said railway company under said contracts, to-wit $4.00 per acre with a rebate of ten per cent. was agreed upon in view of the expressed purpose of the said John Ireland to have said lands immediately settled cultivated and improved by immigrants to be placed thereon by him, thus increasing the population and business tributary to said railway company's railroad. That immediately after said lands were placed in his charge under said first contract above referred to, he began the work and did establish a colony thereon, and expended much time and effort in inducing persons of the classes above mentioned, to immigrate and settle upon said land and in each case of a person so settling thereon said John Ireland entered into a written contract with him to procure for him title to said land so occupied at a sum somewhat in advance of the sum exacted by said railway company so as to compensate the said Ireland for his time and effort in that behalf.

That after the first contract had expired by its terms said railway company not having obtained title, said Ireland in furtherance of the same planned purpose on his part with reference to said colony, for the purpose of making more definite his transaction with said railway company and the settlers with whom he was dealing, purchased himself the whole tract so intended for colonization, and in evidence thereof entered into said contract above referred to, of date March 30th, 1883.

93 That after the execution of said last mentioned contract, said John Ireland in further pursuance of his said plan continued to induce and did induce large numbers of immigrants to settle upon said lands, and he made contracts in each instance with said settlers for the sale of the tract upon which each settled to him, upon the acquisition of title thereto by the said Ireland, at an agreed price, and plaintiff is informed and believes that prior to the time when the rights of said railway company were finally adjusted and it was ascertained that said lands should not inure to said company under its said grants, said Ireland had sold all of said tracts of land in separate, small parcels to individuals, as was desired by those who settled upon and purchased the same.

That plaintiff acquired his title to the tract in controversy under a sale contract so executed by said John Ireland, at a time when both he and his purchaser believed and expected that said land

would certainly be obtained by said railway company under its indemnity grants, and that ultimately title would be made thereto by conveyance from said railway company to the said Ireland and from him to said purchaser.

Plaintiff further alleges that the contract for the sale of lands made between the said railway company and the said Ireland on March 10th, 1883, was entered into in the utmost good faith, and that said Ireland became thereunder, within the intent and meaning of the 5th section of the act of March 3rd, 1887, a *bona fide*
94 purchaser of all of said land including the tract in controversy.

Plaintiff further alleges that the decision of the Land Department cancelling the right of said railway company to said lands under its indemnity grants and the selections made thereunder was not made till the 23rd day of October, 1896, and that theretofore on the 8th day of February, 1896, said John Ireland anticipating the cancellation of said railway company right, because of the then recent cancellation of its right to similar other lands, applied to the local land office for the right to prove himself a purchaser of said land from said railway company and to be permitted to purchase the same from the United States under the 5th section of said act of March 3rd, 1887, which application of the said John Ireland was granted immediately upon the cancellation of the claim of said railway company to said lands.

That said lands never were restored to the public domain or made subject to settlement or entry after the withdrawal thereof as aforesaid and the defendant herein never acquired any right to said land whatever, but on the contrary has been a trespasser thereon.

Wherefore, plaintiff demands judgment as prayed for in the complaint.

Dated, March 31st, 1900.

E. T. YOUNG,
Attorney for Plaintiff, Appleton, Minnesota.

95 *Case Containing Exceptions.*

All the evidence in this action was presented to the court at the trial in the form of a "stipulation of facts" which stipulation was as follows:

EXHIBIT "Z."

STATE OF MINNESOTA, }
County of Traverse. }

Stipulation of Facts.

District Court, 16th Judicial District.

JOHN P. O'CONNOR }
vs. }
JACOB GERTGENS. }

It is hereby stipulated by and between the parties to the above entitled action, subject to the right of either party at the trial to object to the same or any part thereof as incompetent, irrelevant and immaterial, that the facts therein are as follows:

That the premises in question are a portion of a tract of land which was surveyed public land of the United States lying within the twenty mile indemnity limits of the St. Paul, Minneapolis & Manitoba Railway Company under its grant defined by acts of Congress dated respectively March 3, 1857, (13 Stat. L. 195), and March 3rd, 1865 (13 Stat. L. 526).

That said tract with other lands was withdrawn from settlement and entry under the land laws of the United States, by executive withdrawal, dated, May 25, 1869, a copy of which is hereto attached and marked Exhibit "A," and thereby made a part of this stipulation.

On May 22, 1891, the Secretary of the Interior issued an
96 executive order in relation to said lands, directed to the Commissioner of the General Land Office, a copy of which is hereto attached and marked Exhibit "B" and thereby made a part of this stipulation, which purports to be issued pursuant to the provisions of the acts of Congress, dated September 29, 1890, (26. Stat. L. 496); whereupon said Commissioner wrote to the register and receiver of the proper local land office at St. Cloud, Minnesota, under date of May 28, 1891, a letter, a copy of which is hereto attached, marked Exhibit "C" and thereby made a part of this stipulation. The requirements of said letter were complied with by said officers of said land office.

Said company on April 22nd, 1885, filed with the proper officers its selection of and claim to said land and other land as indemnity land to compensate it for deficienc-es claimed to exist in lands within the original limits along its "mainline" to which the acts of Congress above cited expressly referred. Said selection was made in the form and manner described in a letter from said Commissioner to the St. Cloud land officers, dated July 17, 1896 a copy of which is hereto attached and marked Exhibit "H-1" and made a part hereof, and said letter was followed by a letter from said Commissioner to

said officers, dated October 23, 1896, a copy of which is hereto attached and marked Exhibit "I–1" and made a part hereof and by another letter from said Commissioner to said officers dated
97 October 24, 1896, a copy of which is hereto attached and marked Exhibit "K–1" and made a part hereof.

That thereafter and before any action was taken by the officers of the Government under such selection and in August, 1891, the railway company withdrew the specification of losses made in connection with its selection of 1885 and in lieu thereof, substituted a specification of lands, lost on the grant of its St. Vincent Extension railway being the lands embraced within the limits of the grant contained in act of Congress of March 3, 1871, (16 Stat. L. 588), which last selection did designate losses "tract for tract."

That on application of said railway company, made to the Secretary of the Interior, said Secretary issued an order, dated March 21, 1894, a copy of which is hereto attached, marked Exhibit "D" and thereby made a part of this stipulation.

That on October 1, 1895, said Secretary of the Interior made a further order with reference to said land, a copy of which is hereto attached, marked Exhibit "E" and thereby made a part of this stipulation.

That in October, 1895, the Commissioner of the General Land Office issued a letter or order granting said company a further suspension of action on said selections and thereafter on January 13, 1896, said Commissioner issued a rule to said railway company a copy of which is hereto attached, marked Exhibit "F" and thereby made a part of this stipulation, to which rule it is agreed said railway company made no response.

That on July 10, 1896, said Commissioner of the General
98 Land Office rendered a decision relative to all of said selections a copy of which is hereto attached, marked Exhibit "H," and thereby made a part of this stipulation.

That the cancellation of all said selections was declared to be final by the said Commissioner of the General Land Office by his letter of October 23, 1896, a copy of which is hereto attached, marked Exhibit "I," and thereby made a part of this stipulation.

That on February 8, 1896, John Ireland of the city of St. Paul, State of Minnesota, made application to the proper local land office for leave to purchase from the Government this and other tracts within said indemnity grants to said railway company under the provisions of the fifth section of the act of Congress, approved March 3, 1887, (24 Stat. L. 556), a copy of which said application except the description of the lands therein de-cribed, but including the affidavit which accompanied said application and formed a part thereof, is hereto attached, marked Exhibit "J," and thereby made a part of this stipulation. A like application was made by said Ireland to the proper officers of the Marshall land district on March 20, 1896.

That by letter of October 24, 1896, the Commissioner of the General Land Office gave directions with reference to the said application of the said John Ireland to the local land office, a copy of which

letter is hereto attached, marked Exhibit "K," and thereby made a part of this stipulation. By like letter of October 24, 1896,
99 said Commissioner gave like directions to the officers of the St. Cloud land district, a copy of which is hereto attached, marked Exhibit "K–1."

That at the time of the making of said application said John Ireland was a citizen of the United States and a resident of the city of St. Paul in the State of Minnesota and over twenty-one (21) years of age, and based his right therefor upon two certain instruments in writing, executed between himself and said railway company copies of which respectively are hereto attached, marked Exhibits "M" and "N," and thereby made a part of this stipulation. That attached to said Exhibit "M" were lists of land containing in all 66,000 acres describing the tract in controversy herein with other lands as a part thereof.

That prior to the 15th day of April, 1891, said lands were unoccupied, but that during said month this defendant was, and ever since has been, a citizen of the United States and a resident of the State of Minnesota, over twenty-one (21) years of age, the head of a family and otherwise qualified to be a homestead claimant under the laws of the United States, entered upon the tract of land in controversy herein, to-wit: the southwest quarter of section nine (9), township one hundred and twenty-five (125) range forty-five (45) Traverse county, Minnesota and has ever since that time maintained and continued and still does continue in said possession, and use of said tract claiming the same as a homestead, under the laws of the United States.

That prior to November 27, 1895, and soon after his said settlement on said tract, defendant made improvements and culti-
100 vation of said tract, by building thereon a dwelling house eighteen by twenty-six feet, barn eighteen by twenty-four feet, granary sixteen by twenty feet, a good well, and by breaking up and cultivating one hundred and ten (110) acres of said land, all of the value of twelve hundred ($1200.00) dollars.

That on the 27th day of November, 1895, said defendant being qualified to be a homestead claimant, as aforesaid, presented to and filed with the register and receiver of the local land office of St. Cloud, Minnesota, in which land district said tract was and is situated, a proper, legal and sufficient in form homestead application for said lands accompanied by the proper legal and sufficient in form homestead affidavit subscribed by the defendant together with a tender of the lawful fees and commissions, and performed every act required of a homestead applicant.

That said register and receiver received and filed said homestead application and received said fees, as required by the law therefor, and on or about the 2nd day of December, 1895, returned said fees to defendant, and rejected said homestead application for reasons stated in their letter of refusal, a copy of which is hereto attached, marked Exhibit "L," and thereby made a part of this stipulation.

That within the thirty (30) days, allowed by law said defendant

appealed from said rejection to the Commissioner of the General Land Office; that in the course of business said Commissioner entertained and considered said appeal and on October 23, 1896,
101 issued his order of which a copy is hereto attached and marked Exhibit "I" as above stated.

That pursuant to his application to make purchase of said lands as aforesaid and said letter, Exhibit "K" aforesaid, said John Ireland filed notice of intention to make proof of right to purchase under the fifth section of the act of Congress of March 3rd, 1887, which said notice of intention to make proof as aforesaid is shown by Exhibit "O," hereto attached and thereby made a part of this stipulation.

That afterwards, in pursuance of published notice given by the register of said land office, as required by law, that said Ireland would submit his proof in support of his said application to purchase before S. W. Frasier, United States land commissioner at Wheaton, Minnesota, on January 20, 1897, said commissioner having been duly appointed in that behalf by the Commissioner of the General Land Office and notifying all adverse claimants to lands applied for to appear and protest or otherwise defend their claim thereto against the application of said Ireland, the defendant and said Ireland did so appear at said time and place in person, and by their attorneys, when the following proceedings were had, filed and recorded by said Commissioner Frasier, to-wit:

Said Ireland in support of his said application to purchase offered in evidence and had filed and recorded the following testimony, evidence and instruments of writing, and at said hearing other proceedings were had as follows to-wit:

102 Said Ireland being duly sworn testified in his own behalf as follows:

(The following recitals of evidence within parentheses proposed on the part of plaintiff which was inserted in this form in the stipulation of facts, but as to which the trial court sustained defendant's objection, with an exception to plaintiff,—was offered by plaintiff as an amendment to the proposed case and was allowed as such over defendant's objection.)

"In July, 1880, I entered into an agreement with the St. Paul, Minneapolis and Manitoba Company (which agreement gave me the sole and exclusive right to place settlers on certain lands in Bigstone and Traverse counties, and to sell such lands to persons desiring to settle thereon, or otherwise to make purchase of them). The agreement was made in writing, two copies being made thereof, one of which is retained by the railway company, and the other retained by myself."

A written instrument being shown said Ireland, was identified as the contract referred to by him in his testimony, and was thereupon offered in evidence by him, filed and recorded, which instrument so offered is the identical instrument hereto attached as Exhibit M, and inserted in the answer herein at folios 39–48.

Defendant duly objected to said testimony relating to said written

contract of July 17, 1880, for the reason that said instrument should speak for itself and that it is not competent to explain or change its terms by verbal testimony. Each and all of the above ob-
103 jections are sustained. B. F. Webber, judge. He then and there also objected to the introduction of said contract of July 17, 1880, for the reason that it is not, and does not purport to be, a contract to purchase, nor to convey any interest whatever in the lands described therein to said Ireland; which objections were duly entered on the record of said proceeding by said commissioner. The last named objection is overruled. B. F. Webber, judge. Exception.

Said Ireland further testified in answer to the following questions propounded by his counsel:

("Q. Did you have a conversation with any official of said company in 1883, relative to the aforesaid agreement, and make a new arrangement with the company respecting said land; if so, describe the conversation as nearly as you can remember?

"A. In March 1883, I had such conversation with James B. Power, land commissioner of the St. Paul, Minneapolis and Manitoba Railway Company. I said to him 'my contract made a few years ago is now expired without the railroad having secured title so far. I have been to a very large expense inducing immigrants to settle on those lands; I now propose another agreement; I will buy, myself, a large quantity of those lands, and holding them as my own, deal directly with the settlers, putting on the lands any prices I may choose, for my own benefit.' Mr. Power answered 'Very well.' I replied 'I wish you to understand very well that I am buying those lands as my own, so that I may make as far as I think expe-
104 dient, a profit out of them.' He said 'The lands are yours. I hope you will make two hundred thousand dollars out of them.' He then began jotting down the nature and conditions of the contract.

"Q. Was the conclusion reached by reason of that contract subsequently reduced to writing in the form of an agreement or contract; if so, how was that contract executed?

"A. It was so reduced to writing, the contract was executed in duplicate by Mr. Power and myself, he retaining one copy and I the other.")

Said Ireland then introduced in evidence and had filed as the contract referred to by him in his testimony an instrument in writing, dated March 30th, 1883, marked Exhibit C, together with endorsement upon the back of said contract of its having been recorded in the office of the register of deeds of Traverse Co., Minn. Said contract is in the words and figures as follows, to-wit:

EXHIBIT C. (This is Exhibit "N" in this action.)

Graceville Colony Second Contract.

Whereas, a certain agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and The Rev. John Ireland, party of the second part, bearing date the 17th day of July, A. D. 1880, by which the party of the second part was given the sole and exclusive right to sell and locate settlers upon a certain lot of lands in the counties of Bigstone and Traverse,
105 in the State of Minnesota, which lands are particularly described in said contract and among other provisions of said contract, it provides:

That the party of the first part shall notify the party of the second part as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from date of such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into a contract in the usual form with the party of the first part and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold to him by this agreement.

Now therefore; the contract herein referred to having expired on the 31st day of December, A. D. 1881, and the R. R. Co., not yet having acquired title to the lands in question it is now agreed between the R. R. Co., and the Rev. John Ireland that when title to these lands are acquired by the R. R. Co., and notice of the same is given to Rev. John Ireland, he shall have the privilege and the right at any time within sixty days of date of said notice of purchasing for himself or such parties as he may designate due regard being had as stated in supplement to said contract for settlers who may have obtained any claim upon such lands previous to the date of said contract any or all of the lands included in said contract not to exceed the amount of 50,000 acres at uniform price of four dollars per acre, ten
106 per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland according as the monies are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate the conditions of sale usual with the company shall be observed or at least the interest upon the purchase money shall be paid from the date of purchase to the fifteenth day of December following, when the usual condition shall be enforced.

(Signed) JAMES B. POWERS,
Land Commissioner, St. P., M. & M. R'y Co.

Office of land department, St. P., M. & M. R'y Co., March 30, 1883.
John Ireland.")

To each of which questions and answers relating to said contract, said defendant then and there duly objected for the reasons that said contract must speak for itself, all prior understandings and verbal agree-

ments relating thereto being merged therein. The above objection is sustained. B. F. Webber, judge. Defendant also objected at the time to the introduction of said contract because on its face it does not purport to be a contract of purchase conveying a present interest in lands described therein, hence is no evidence of the purchase of lands as required by the act of March 3, 1887, and that neither party thereto could contract against the right of settlers who may have become interested in these lands between the dates of these
107 two contracts, which objections were duly recorded; the above objection is sustained, B. F. Webber, judge. Also that said contract not being acknowledged or witnessed as required by the statutes of Minnesota was not entitled to record. The last above objection is overruled. B. F. Webber, judge. Exception.

Ireland's counsel then propounded the following question:

"Q. What consideration if any did you at the time, or have you prior to the date of the 1883 contract given to the railroad company for the execution of their contract?"

Ireland answered as follows:

"A. The consideration in view of the railroad company made with me the agreement in question was the labor which I had given and was giving to bring settlers along the line of the company and the large expenditures which I had made, and was making for the same purpose."

Defendant then and there objected to said question and answer as incompetent, irrelevant and immaterial, which objection was duly recorded.

The last above objection is overruled. B. F. Webber, judge. Exception.

Ireland's counsel then asked the following questions, to which witness made answer as herein set forth:

("Q. Why did you not purchase all the land embraced in
108 the first contract of 1880, the entire sixty-six thousand acres described in that contract?

"A. Largely because I was not sure that I could handle successfully more than 50,000 acres, and I did not wish to enter into an agreement to do anything, which I was not morally sure I could do.

"Q. Then if the new contract had been a mere renewal of the former you would have embraced therein all of the land?

"A. I would in such supposition have taken under the second agreement all the lands I could get hold of, because then there would have been no risk on my part, and there might be gain.

"Q. Did you have knowledge or information at the date of this second contract respecting the condition of these lands as to occupancy by *bona fide* settlers under the United States laws?

"A. So far as I had information, and I had taken pains to obtain good information, there were at that time no such occupants on any of the lands.)

"Q. Did you believe at the date of the last mentioned contract,

that in the contract of 1883, that the St. Paul, Minneapolis and Manitoba Railway Company had a right to sell these lands?

"A. I did.

"Objection overruled. B. F. Webber, judge. Exception.

"Q. Were they sold to you by the said company as a part of its grant?

"A. They were.

"Objection overruled. B. F. Webber, judge. Exception.

109 ("Q. Did you consider yourself obligated by said contract to purchase the entire 50,000 acres of land to which it related?

"A. I certainly did.

"Q. Provision is made in said contract that the said company shall notify you of the acquirement of title by it to any of said lands, whereupon you are required to select and settle for such of said lands as you may desire having the title thereto, conveyed directly to you, or to such parties as you may designate, what was the object of inserting the clause or such party as he may designate?

"A. This clause was inserted by Mr. Powers at my own request. I wished to avoid the expense and trouble of double deeds and double record.")

Defendant to each of the foregoing questions and answers, entered his objections as irrelevant, incompetent, and immaterial, and because witness seeks thereby to explain, change and add to the written contract in evidence, the terms of which are unambiguous and because such questions and answers relate entirely to alleged understandings between Ireland and the railroad company, or of Ireland alone, prior to the execution of said contract, which objections were duly recorded. Each objection sustained except as otherwise indicated. B. F. Webber, judge.

In answer to the following questions by his counsel, Ireland testified as follows:

("Q. Did the company ever notify you of the acquirement
110 of title by it, to any of the lands embraced in the contract of 1883, and call upon you to make selection of and settle for the same; if so, and said notice was a written one, please produce and state what the company did in relation thereto?

"A. On March 23, 1889, the railroad company notified me that it had obtained title to some 26,000 acres of land embraced in my agreement with the railroad of March, 1883, and requested me to make what selection I wished of those 26,000 acres; I sent a letter to the railroad. I notified them that I would select out of the quantity put before me some 16,000 acres; and that I would release to them the remainder. They then sent me out a quitclaim deed to be signed by me in which they then were entitled to the 8,000 acres that I did not wish to retain; the deed was duly signed and witnessed and placed in the hands of the land commissioner.")

Ireland then offered in evidence and had filed the instrument referred to by witness as a quitclaim deed and had it marked Exhibit "D," which instrument is in words and figures as follows, to-wit:

Exhibit "D," (as designated in land office proceedings, and inserted in answer herein at folios 69–73.)

Ireland then offered in evidence and had filed a letter, with lists of lands attached thereto, from the land commissioner of said railway company, to him, dated March 28, 1889, marked Exhibit "E," which instrument is in words and figures as follows, to-wit:

111 Exhibit "E" (as designated in land office proceedings and inserted in answer herein at folios 74–'5).

(Here followed descriptions of several tracts of land other than that in the complaint and first hereinabove described and other than that embraced in Ireland's said application to purchase.)

That none of the lands referred to in Exhibits "D" and "E" or either thereof, were embraced in Ireland's application to purchase aforesaid.

Defendant then and there objected to each of the last mentioned questions and answers as incompetent, irrelevant and immaterial; also objected to the introduction of said Exhibits "D" and "E" because they relate to other lands than those embraced in Ireland's application to purchase, which objections were duly recorded.

Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

Counsel for Ireland then propounded the following questions, to which he made answer as herein set forth.

("Q. At the time of making selection under the notice, did you make payment for, and settle for any of these lands selected by you? A. Yes."

"Q. When you made such selection and settlement were
112 there contracts and conveyances executed by the company for such lands; if so, to whom were they executed? A. Conveyances of one kind and another were made by the company, and mostly to myself directly.")

Defendant then and there objected to each of the last mentioned questions and answers for the reason that they are incompetent, irrelevant and immaterial, and relate to lands not embraced in Ireland's application to purchase. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

Counsel for Ireland then propounded the following questions, to which he made answer as herein set forth:

("Q. It is provided by the contract of 1883, that ten per centum of all receipts from said lands shall be paid to you according as the moneys shall be received by the company; why was that clause inserted? A. During our conversation as to the purchase of these

lands, Mr. Power was jotting down on paper the terms, conditions and natures of each. He read to me what so far he had jotted down. The right to purchase 50,000 acres at $4 per acre; I interposed at once he must change the figures. I do not wish to pay for the lands more than I should have paid for them, had I taken them under the first contracts; I want them at $4 an acre less ten per cent.; he then put down 'Very well, ten per cent.' When I returned some days afterwards to execute the agreement, I
113 found that the agreement rehearsed the words which had been jotted down in the draft, and it read as the present contract reads. I allowed the words to stand, as they seemed to convey sufficiently, but he, in fact, indicated a rebate. And moreover, as I was issuing contracts at four dollars an acre to the settlers, in which it was stated that I would on certain conditions receive, obtain for them and from the railroad, contracts for them at four dollars an acre in which case they would themselves pay to the railroad four dollars an acre, I thought the wording of Mr. Power would suit exactly as it enabled me to obtain a rebate through the railroad from the prices paid in by those to whom I had issued contracts.)

("Q. Is that rebate allowed to you when you make payment for land taken in your own name, as well as in cases where you designate some other person for whom your conveyance shall be made? A. Yes.")

Defendant objected to each of the last mentioned questions and answers as incompetent because they relate to understandings and conversations had between Ireland and the railroad authorities prior to the execution of the contract of 1883 in evidence, and because it is sought thereby to explain and add to the legal significance of said contract, which objections were duly recorded.

Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

114 Ireland's counsel then propounded the following questions, which he answered as herein set forth:

("Q. Have you sold any of the lands embraced in this application or authorized agents to sell the same for you? A. I have, many of these lands, and authorized agents to sell them for me.

"Q. Have you entered into any written agreement with any person or persons authorizing them to sell any of these lands in your name, if so, with whom? A. I have entered into a written agreement with R. S. Tyler, of Fargo, authorizing him to sell lands in my name. With R. S. Tyler; such lands designated in my contract of 1883, and many of them contained in the list of lands now under discussion.

"Q. Was that contract like those of the railroad company executed in duplicate—if so, what disposition was made of the several copies? A. Such contract was made in writing, two copies of it being duly executed, Mr. Tyler retaining one and I retained the other.")

Said Ireland then filed and offered in evidence a written instrument dated December 30th, 1889, referred to by witness as contract made between him and R. S. Tyler, of Fargo, North Dakota, which instrument is in words and figures as follows, to-wit:

Exhibit "F" (as designated in land office proceedings and inserted in the answer herein at folios 85–96).

115 Defendant then and there objected to such of the last mentioned questions and answers as incompetent, irrelevant and immaterial; also objected in like manner to introduction of said instrument marked Exhibit "F" as incompetent and irrelevant, which objections were duly recorded. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

Ireland's counsel propounded the following question, to which he made answer as follows:

("Q. Did you at any time address a letter to Samuel Hill, president of the railroad company, relative to making a settlement of this land matter? If so, can that letter be produced here? A. I wrote such letter March 14, 1894.")

Said letter was then offered in evidence and marked Exhibit "G," which is in words and figures as follows, to-wit:

Exhibit "G" (as designated in land office proceedings and inserted in the answer herein at folios 98–100).

Defendant then and there objected to said question and answer and to the introduction in evidence of said Exhibit "G," for the reason that Ireland is attempting thereby to manufacture evidence for himself bearing upon the legal effect and interpretation of said contracts with the railroad company, which objection was duly recorded. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

116 On cross-examination of Ireland by defendant's counsel the following questions were propounded to him and to which he made answer as herein set forth:

"Q. You stated in your direct examination that the railroad company had given you notice and the contract had been completed, deeds executed and lands paid for as to certain lands; those lands were those only which had been patented to the railroad company, were they not, and did not include any of the lands embraced in this application? A. The deeds were not; none of those lands were included in this present application, and are not in controversy here.

"Q. As I understand you, the only consideration that you claim upon your part on account of the lands in controversy here, is your labor and expense in handling and disposing of the same? A. Yes, my labor and expense and the further obligation to pay for the lands when the railroad would have obtained title.

"Q. You have not, in fact, paid anything to the railroad com-

pany, either in money or property, on account of the lands now in controversy? A. I have settled up the country for them. Specific payments for specific sections have not been made, for such payments were to be made only when title would vest in me from the railway company.

"Q. The railway company has not received anything in the way of either property or money given by you to them, on account of the lands here in controversy? A. Not under the head of specific payments for specific pieces.

117 "Q. Has it received either money or property from you in payment for the body of lands now in controversy or for any part of it? A. The railroad so far has received from me no other payments for the lands now in controversy than my labor and expense in settling up the country.

"Q. Now, referring to your contracts with the railroad company, do you understand or contend that the railway company, by virtue of those contracts, should compel you to take the fifty thousand acres of land, or any part of it, if you should decline or refuse to do so? A. They could have compelled me to compensate them for all loss and embarrassment which might have come to them by taking the lands from their control during a certain number of years. I had no right to and never contemplated taking lands from under the control of the railway without taking them finally from the railroad.

"Q. Do I understand you to contend that the company under that contract could legally compel you to take the land and pay for it, or to compensate them for indemnities for not doing so? A. Well, I submit the contract to my attorney, and let it speak for itself. I will submit my contract and all its consequences to my attorney.

"Q. In the various contracts issued by you to the purchasers from you, except the so-called breaking contracts, the contract receipts for a certain amount as cash paid down, at the execution of the

118 contract, those receipts are correct, and the amounts so stated as paid were actually paid to you by the respective purchasers, were they not? A. Yes."

Ireland then introduced, as a witness in his behalf, JAMES STODDARD, who, being duly sworn, testified as follows in answer to questions propounded to him by Ireland's counsel, as herein set forth:

("Q. State your name, place of residence, and occupation? A. James Stoddard, St. Paul, chief clerk of the land department of the St. Paul, Minneapolis & Manitoba Railway Company.

"Q. How long have you been in the employ of said company? A. Nearly fifteen years.

"Q. Were you employed in the office of said company, when the so-called Ireland contracts of 1883 were executed? A. Yes.

"Q. And are you familiar with that contract? A. I have a copy of it on file in my office.

"Q. Have your duties been such as to make you familiar with the

transaction had in relation to lands embraced in said contract? A. They have.

"Q. Has said company ever sold any of the lands embraced in the pending application of John Ireland to any other person than John Ireland, and would you have known the fact if there had been? A. They have not. My duties are such that I would have known if any contract had been issued.

"Q. What was the general understanding among the employés of said company respecting the status of these lands? A. They were considered Ireland's lands.

119 "Q. Is there in use in the office of said company any map or diagram showing what are known as Ireland's lands? A. There is.

"Q. Have you the original map with you? If so, please allow it to be examined and we will offer a copy in evidence.

(Copy of original map shown witness marked Exhibit "H" [as designated in land office proceedings].

"Q. By looking at that map you can tell us in what township and range the so-called Ireland lands lie? A. Yes, sir. Town 123, range 45; town 124, range 45; town 125, range 45; town 126, range 45; town 124, range 48; town 125, range 46; town 126, range 46; town 125, range 47; town 126, range 47.

"Q. What do you understand by these notes? A. It shows the status of the land.")

Witness here identified Land Office Exhibits "G" and "D," the originals of which he testified belong to and were a part of the files of said railroad company.

Defendant objected to each of the questions and answers propounded to and given by witness Stoddard as irrelevant and immaterial; also that in so far as he undertook to state and give the general understanding of the employés of said company as to Ireland's rights to lands embraced within said contract of 1880 and 1883, such testimony was hearsay and incompetent; also in so far as witness testified to facts or matters contained in the records and files of said company relating to said contract and said lands described

120 therein, from his memory of such data, the same is incompetent and hearsay, such records and files being the best evidence of their contents. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

Said Ireland then introduced witness JOHN P. O'CONNOR in his behalf, who, being duly sworn, testified to questions propounded to him by Ireland's counsel, as herein set forth:

"Q. State your name, place of residence, occupation? A. John P. O'Connor, St. Paul, Minnesota; secretary to John Ireland.

"Q. Are you familiar with the contracts between Ireland and the railroad company, which have been filed in evidence in this case? A. Yes, sir.

"Q. What connections have you had, if any, with the sales or execution of contracts by and between John Ireland and the persons to whom he has sold or agreed to sell any of the land here in controversy? A. Both of these contracts were written out by myself, and nearly all of them passed through my hands, for the purpose of recording in our books.

"Q. In the performance of your duties as secretary to John Ireland have you kept a record of the sales, by and between John Ireland and the parties to whom he has conveyed or agreed to convey lands? A. Yes, sir.

"Q. Can you state either from memoranda in your possession or from memory, the names of persons to whom John Ireland
121 has sold or agreed to sell portions of the land here in controversy? A. Yes, sir.

"Q. Will you please give the names of parties to whom such sales were made together with description of lands sold to each?

(Here follow descriptions of certain tracts of land embraced in Ireland's contract of 1883, together with the names of persons to whom he had contracted the same, including the land described in the complaint herein.)

"Q. What is this book you have relied upon for the statements you have just made? A. This is the book kept by me for Archbishop Ireland in the office.

"Q. It has been shown by the testimony of claimant Ireland and witness Stoddard, that these contracts between Ireland and the railway company were closed up as to certain lands, embraced therein which had been conveyed by the United States for the benefit of the railway company, and in some instances deeds issued by the company. Do you know whether, in any such cases, John Ireland had issued quit-claim deeds to parties designated by him as purchasers and to whom contracts or deeds were issued by the railroad company? A. Yes, I do. I wrote them out and had them acknowledged.

"Q. Under what circumstances were quit-claim deeds executed? A. Many of the purchasers from Ireland, having gotten deeds from the railroad company through Ireland, came to us and stated that
in making loans on their property, they were held back by a
122 cloud of title on their lands, which could only be satisfied by a quit-claim deed direct from Ireland. And so we gave them the quit-claim deeds.

On cross-examination by defendant, witness O'Connor answered the following questions, as herein set forth:

"Q. Are you the same J. P. O'Connor who is the purchaser of a number of tracts of land? A. The same.

"Q. How many acres of land embraced in the application did you purchase of Bishop Ireland? A. About 7,700 acres.

"Q. I would like to inquire the date and class of the contract issued upon section 1, town 125, range 46, to yourself? A. I could

not give you any dates. I have no record of the dates of issuance of any contracts here.

"Q. As to the class, can you say whether it was that known as number one, two or three? A. It was a modified form of number one.

"Q. What does that mean? A. Well, there was a consideration in it and the railroad company's name did not appear in the form as often as it appears in the original form number one.

"Q. Is it a breaking permit? A. No.

"Q. Have you a sample of the form in your possession? A. Not here.

"Q. Is that one in your hand? A. This is not the form of contract under which I bought land.

123 "Q. Was there a form used expressly for the land that you bought of the bishop? A. There was some printed forms, some which we ordinarily bought from supply houses; the writing on those forms, filling out of those forms varied under certain conditions.

"Q. Would you be willing to furnish a sample copy of the form in question to be placed in evidence in this court? A. I would not wish to do anything that might jeopardize my claim without consulting my own attorney.

"Q. Then you decline to allow the sample copy to be used, in this case, do you? A. I hold all my papers, protect my own claims, and will not produce them until necessary.

"Q. In other words, until you have? A. I decline to answer.

"Q. When and what class of contracts was issued up- N. E. ¼ of section seven, 125, 46? A. A contract known as number two contract.

"Q. When? A. The date of the issue of those contracts I do not vouch for being the exact day; it was in December, 1880. My date refers more to the cash receipts of our office. Sometimes the contract is signed in St. Paul, and sent to Graceville, and the contract might bear the date of the time it was made in St. Paul, and my book would show the date of receipt of money for that contract.

"Q. Can you give the class of contract and the date issued upon S. W. ¼ of section 33-126-45? A. That is a similar contract to the one described in answer to the contract covering the S. W. ¼ of 1-125-46.

124 "Q. Were those contracts which were issued to the bishop's secretary, yourself, peculiar to themselves? A. I think I shall decline to answer any questions relating to John P. O'Connor personally in relation to his purchase, for the reason that my attorneys are not here to protect me in any rights I may have, and which I think I have.

"Q. Then any question that may be asked you with reference to the seven thousand or more acres of land that you have bought from the bishop you decline to answer? A. I decline to answer, for the reason that I fear I may jeopardize my claim, as stated before, without consultation with my attorneys.

"Q. You mean by that that you would like to consult your attorneys as to what your answers should be? A. I mean just what I said.

"Q. You even refuse to give us the date of your purchase? A. I refuse, because my dates cover several years, and I cannot designate these dates off-hand.

"Q. Will you tell us whether you made those purchases in the interest of yourself, in good faith, or for the interest of the bishop or some one else? A. I do not know really whether I should answer or give precise information, and I always try not to do so, in giving the date of the contracts to others than the parties directly interested, by not doing so, I fear that I might jeopardize those claims, for I have known of many inquiries coming to me from parties either contesting claims or pretending friendship for the parties who hold contracts from us, and proved themselves friends of
125 the contestants; and for that reason I do not wish to give any further information on any claims sold by John Ireland except to the claimants themselves or their proper attorneys or representatives.

"Q. Will your answer to inquiries as to all of the other tracts which you claim to have purchased from Bishop Ireland be the same as the answers given in response to the interrogatories propounded by Mr. O'Hair in his cross-examination? A. Practically the same.

"Q. When you said in cross-examination that you declined to answer as to any of those lands, which it is shown by the evidence you purchased from Ireland, did you mean to say that you would decline to answer as to those tracts generally, or merely as to your own connection therewith as a purchaser? A. My answer was intended to cover all personal purchases I made myself.

"Q. This is a sample (paper handed witness) of what is known as contracts number two? A. Yes.

"Q. Were these contracts number two issued under the first or second contract of Archbishop Ireland with the railroad company? A. They were issued under both contracts as during the time covered between the lapse of the first contract and the renewal of the second, and were issued down as late as 1889.

"Q. Do I understand you to say that some of these contracts known as number two were issued during the life of the first
126 contract of John Ireland with the railway company that has been offered in evidence? A. I have just stated that they were.

"Q. When were those contracts number one issued? During the time of John Ireland's contract with the railway company dated July 17th, 1880, was in force, or afterwards? A. Most of those contracts were issued before any contract was made by Ireland and the railroad company. Some before and some during the life of the first contract."

Ireland's counsel objected *to* the time to each and all questions

and answers propounded to witness O'Connor by plaintiff, or his attorneys, and to witness's answers thereto, concerning the claim of witness O'Connor to any of the lands embraced in Ireland's application to purchase, for the reason that the claim of witness is not in question, which objections were duly recorded. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

Exceptions by defendant.

That the foregoing testimony of Ireland and his witnesses, together with the several instruments of writing and contracts filed by him as proof and exhibits, as herein set forth and referred to, constituted all of said Ireland's proof in support of his application for purchase; whereupon said Ireland rested his case.

That defendant, at said time and place, offered the following evidence in support of his settlement and homestead rights to the tract of land involved in this case, as well as in support of his pro-
127 test then and there filed by him against said Ireland's right or claim to said tract under his said application to purchase, or otherwise.

That said defendant introduced and had filed and recorded a stipulation entered into in behalf of said defendant and Ireland, by their respective attorneys, dated January 21st, 1897, defendant being represented therein by Stockslager & Heard, his attorneys, and Ireland being represented therein by Charles H. Babbitt, his attorney, which stipulation is in words and figures as follows, to-wit:

STOCKSLAGER & HEARD'S EXHIBIT "A" (as Designated in Land Office Proceedings).

"In the Matter of the Application of JOHN IRELAND to Purchase the Tracts of Land, Hereinafter Mentioned and Described, under and Pursuant to Section 5 of the Act of March 3rd, 1887.

"And the said John Ireland stipulates and admits that the several statements and claims made by the said parties respectively, whether in their original applications, and being thereunto duly authorized by law, proceeded or as made, set forth, or advanced before S. W. Frasier, Esq., court commissioner of the United States circuit court, at Wheaton, Traverse county, Minnesota, in the above matter of the application of the said John Ireland to make proof in support thereof, are true as to settlement, residence, cultivation, improvements, application or entries or either of them; and that for the purpose of this hearing, the same shall be considered as evidence in this case.

128 "That the said parties were each and all qualified to take homesteads under the land laws of the United States and in each and every case, the said parties made application for and made settlement upon the said several tracts, believing that no valid railroad claim was then existing, and that such lands would ultimately

be open for settlement and entry; and that each of said parties intended to claim, did claim, and do continue to claim the same as a homestead; but the said John Ireland denies that they acquired any rights thereby.

"And it is further stipulated and agreed that each of said parties who held and may still hold a contract or contracts from John Ireland, or transfers or assignments of and such contracts, and who has made homestead application for the land embraced therein has done so upon the advice of counsel that neither the railroad company under its grant, nor said John Ireland under his contracts with the company, referred to in his said application to purchase, had or could obtain such claim or title to said several tracts, or any of them, as to secure the said parties or either of them titles to said land, or any part thereof as agreed, and that for the purpose of protecting their rights and securing title to their homes they asserted their said several claims under the homestead law, as they were so counseled and advised to do.

"It is hereby stipulated and agreed by and between John Ireland and the parties hereinafter mentioned, as claimants for the
129 said tracts set opposite their respective names, that at the time the said parties made their respective applications, or made settlements upon the said several tracts, so claimed by them and each of them, it was known to each of them, that the said tracts were then under a withdrawal for railroad purposes under claim by the railway company as indemnity lands, except such claimants as made settlement or application to file subsequent to the date when the revocation of said indemnity withdrawal becomes effective.

"And it is further hereby agreed by and between the several parties in interest, that where there is a variance in dates between the allegation of settlers made by applicants for entry in connection with their applications, and the allegations admitted at this hearing the sworn statements of the parties shall be accepted as the facts for all purposes of this hearing.

"Dated this 21st day of January, 1897.

"CHARLES H. BABBITT,
"STOCKSLAGER & HEARD."

That at said time and place said defendant, with others, and said Ireland, entered into an agreement before said United States commissioner, who then and there entered said mutual agreement and stipulation upon the record of said proceedings as follows, to-wit:

"It is hereby stipulated and agreed by and between John Ireland, the applicant to purchase herein, and the several persons,
130 whose names follow, and such agreement is now made a part of the record, viz: That the matters and things set forth in their several protests now here filed may be taken and considered as their several claims or statements of facts in their cases respectively in so far as relates to the negotiations to enter settlement, residence and improvements upon the land obtained by each of said parties, made, set forth and advanced at this hearing.

That said applicants now here file their several protests together with a description of the land claimed by each under their several homestead applications, viz:"

(Then followed the name of the said defendant herein and opposite to his name the description of the land in the complaint and first hereinabove described with a reference to his protest as an exhibit, also the names of other protestants, with the description of land claimed by each).

"Comes now S. M. Stockslager and submits the above and foregoing several protests, together with the enclosures as the answer of each and all of said homestead applicants to the citation of John Ireland, the applicant to purchase herein, to show cause why he should not be permitted to purchase said several tracts of land or either of them, and also the claim of each of said applicants to the lands in controversy as fully set out in said protests.

"Under the stipulation filed herein, marked Exhibit "A" of Stockslager & Heard, the affidavits and other papers on file
131 with said other applications above referred to, are also to be considered in evidence as a part of the case of each said applicants. Papers on file are to be considered."

It is stipulated that said papers referred to as being on file in the words last above quoted are the defendant's homestead application and homestead affidavit heretofore referred to and described in this stipulation and also his protest offered, filed and recorded against the application of said Ireland, which protest is as follows: "That the said defendant protests against the said application of said Ireland to purchase said tract; and that said defendant was qualified to make homestead entry therefor and had filed his homestead application by which he claimed said tract as a homestead and had made valid settlement thereon and had resided thereon ever since the date of said settlement and had made the improvements on and the cultivation of said land in controversy, (said improvements and cultivation being of the character and value hereinbefore particularly stated), all on the dates, in the manner and as hereinbefore stated," and tendered lawful fees and commissions.

That said Ireland was not a *bona fide* purchaser of said tract from the St. Paul, Minneapolis and Manitoba Railway Company under section 5 of the congressional act of March 3rd, 1887, as to entitle him to purchase said tract from the United States.

That said Ireland never purchased or contracted to purchase said tract from said railway company by any valid contract of
132 sale or purchase, and that his alleged contracts with said company, dated July 17th, 1880, and March 30th, 1883, respectively, upon which he based his said application, were utterly invalid and insufficient to convey or confer any title to said lands upon him, of any kind, and that the claims and title of said railway company to said lands had been duly cancelled and rejected by the Interior Department as hereinbefore stated. Whereupon, said lands immediately became subject to the said defendant's homestead appli-

cation which said defendant asked might be allowed and that said Ireland's application to purchase be denied."

That the foregoing stipulations and protest were all the evidence offered by defendant, whereupon he rested his case.

That said United States commissioner having, as aforesaid, taken and recorded the said evidence of Ireland, and said defendant, the said witnesses, having duly signed their testimony as herein set out, after being duly sworn by said commissioner at the time and place aforesaid, in due time forwarded to the register and receiver of the United States land office, at St. Cloud, Minnesota, a full and correct record of all of said proceedings had before him as herein set forth, duly authenticated, attested and certified by him as such United States commissioner to be a full and perfect record of all of said proceedings.

That in due time said register and receiver, having received said record and proceedings as taken and recorded by said United
133 States commissioner, as aforesaid, and being thereunto duly authorized by law, proceeded to consider and try said cause as certified to them as aforesaid, and on March 16th, 1897, rendered their decision therein by which they sustained and allowed Ireland's said application to purchase the tract in controversy, and rejected and refused to sustain said defendant's protest against the same, but rejected and disallowed all claim made by said defendant to said tract under his said settlement and homestead application aforesaid.

That in due time said defendant appealed from said decision to the Commissioner of the General Land Office in strict accordance with the rules of the Land Department governing appeals in such cases.

That said register and receiver, in pursuance of defendant's said appeal, forwarded the same, together with their decision and the said record of proceedings had between Ireland and this defendant before said United States commissioner, as hereinbefore set forth, to the Commissioner of the General Land Office.

That in due course of business said Commissioner of the General Land Office proceeded to examine and try said cause between said defendant and said Ireland, on the record aforesaid, and on February 3, 1896, rendered his decision thereon, wherein he sustained and allowed said Ireland's application to purchase, and rejected and disallowed said defendant's protest against the same, as well as all claim made by said defendant under his said settlement and home-
134 stead application. Said Commissioner's decision is in words and figures as inserted in the answer herein at folios 153–208.

That in due time said defendant appealed from said Commissioner's decision to the Secretary of the Interior in strict accordance with the rules of the Land Department relating to appeals in such cases.

That the Commissioner of the General Land Office in due time allowed and forwarded said defendant's appeal from said decision, together with the record aforesaid, with his decision appealed from, to the Secretary of the Interior, who, on January 20th, 1899, exam-

ined and tried said cause on the record and appeal aforesaid, and affirmed and sustained the Commissioner's said decision, thereby sustaining Ireland's said application to purchase, and rejecting and disallowing said defendant's protest and claim to said tract under his settlement and homestead application, said decision being in words and figures as inserted in the answer herein at folios 210-212.

That in due time and in strict accordance with the rules of practice of the Land Department, said defendant, prior to the 20th day of February, 1899, filed his motion for review of the Secretary's decision aforesaid, which motion for review the Secretary of the Interior examined and considered, and on the 24th day of April, 1899, overruled and disallowed said motion for review and reaffirmed his said decision of January 20th, 1899, which decision on review is in words and figures as inserted in the answer herein at folios 212-215.

135 That thereafter in due time and by virtue of and under authority contained in said Secretary's decisions, the said register and receiver allowed said Ireland to purchase and to pay for said tract of land in controversy, and to enter the same under the laws of the United States.

That thereafter in pursuance of such purchase and entry by said Ireland, the officials of the United States Land Department received from said Ireland the sum of $1.25 per acre for said land, as required by said act, and issued to said Ireland a final receiver's receipt and certificate of purchase under section 5 of the congressional act of March 3, 1887, entitling the said Ireland to a patent from the United States of the tract in controversy claimed by this defendant as aforesaid, and on December 21st, 1899, issued such patent to said Ireland, a copy of which is hereto attached marked Exhibit "O-1."

That from a time long prior to the date hereinafter stated the Minneapolis Trust Company, was, ever since has been, and still is, a corporation duly created and organized under and by virtue of the laws of the State of Minnesota, with its place of business in the city of Minneapolis, in the State of Minnesota.

That on, to-wit, the 16th day of October, 1897, said Ireland executed and delivered to said Minneapolis Trust Company a deed in the form of warranty, dated the 16th day of October, 1897, whereby he purported to convey to said company the land in said com-

136 plaint and first hereinabove described, with other lands, which said deed was recorded in the registry of deeds of Traverse county, Minnesota, on the 22nd day of October, 1897, in Book K of Deeds, on pages 513, 514 and 515, and in the registry of deeds of Big Stone county, Minnesota, on the 21st day of October, 1897, in Book S of Deeds, on page 101.

That, although said deed was warranty in form, said land was in fact by it conveyed to said company in trust for said Ireland, empowering said company, as agent for said Ireland, to dispose of said land, and contemporaneously with the execution and delivery of said deed said company duly made and delivered to said Ireland its

declaration of such trust by instrument bearing even date with said deed.

That thereafter, and prior to the commencement of this action said Minneapolis Trust Company conveyed to the plaintiff the premises here in question and other lands pursuant to a contract executed by said Ireland to the plaintiff prior to the purchase of said land from the United States by said Ireland as herein stated, and at the time of the making of said contract and the receipt of said conveyance as aforesaid, plaintiff, said Ireland, and said trust company had full notice and knowledge of such rights, claims and equities as existed in behalf of defendant as a homestead claimant as hereinabove stated.

That at the date of the letter of March 14th, 1894, referred to in said Ireland's testimony, which letter was marked Exhibit G at the time the testimony was taken before the Land Department,
137 Samuel Hill was and ever since has been president of the St. Paul, Minneapolis & Manitoba Railway Company.

That during all the period from the date of the letter aforesaid until after the conveyance to the plaintiff by said Minneapolis Trust Company, said Samuel Hill was likewise the president and one of the principal stockholders of said Minneapolis Trust Company.

It is further stipulated that all the testimony which was presented upon the hearing before the Land Department of the United States, and which is hereinbefore set out or hereto attached, including all the stipulations of the various counsel and attorneys of the parties, oral and written, and the protests of the defendant, both oral and written, which are hereinbefore set out or hereto attached, shall be considered as the evidence upon and stipulations between and binding on the parties in the trial of this action, subject to the same objections interposed to said testimony when the same was taken and which objections are specified in said testimony as having been interposed to the same when offered as hereinbefore set out.

That the decision of the Commissioner of the General Land Office of February 3, 1898, and the decision of the Secretary of the Interior dated January 20th, 1899, hereinbefore recited, are the decisions respectively of said Commissioner and Secretary upon such claim, objection and protest.

That the following offer of evidence within parentheses,
138 proposed on the part of plaintiff, which was inserted in this form in the stipulation of facts, but as to which the trial court sustained defendant's objection, with an exception to plaintiff, was offered by plaintiff as an amendment to the proposed case and was allowed as such over defendant's objection.

It is further stipulated that said John Ireland hereinbefore referred to would, if present at the trial of this case, testify, and that upon the hearing thereof it shall be considered as if he had so offered to testify, and that if the objections to said testimony should be overruled, that he did so testify, (that at all times mentioned in this stipulation, or any of the transactions referred to therein, he was a Catholic archbishop of the diocese of St. Paul with ecclesiastical jurisdiction over

the State of Minnesota, and that he would testify that at the time of the making of the contracts between said Ireland and said railway company hereinbefore set out, it was the purpose of said Ireland, made known to and understood by said railway company, that the land embraced within and described in said contracts between said Ireland and said railway company, were to be used by said Ireland for the purpose of establishing thereon a colony of settlers of his religious faith and were to be re-sold [in smaller tracts] to divers individuals).

That said Ireland would further testify (that in pursuance of said plan, immediately after the making of said first contract with said railway company, he began to place individuals upon portions of said lands with whom, in each instance, said Ireland made a
139 contract in writing, agreeing to have such lands conveyed to the grantees therein by said railway company upon title being acquired by it, and if not so acquired said contract to be void, and the money, if any, paid upon said contract to be refunded by Ireland, a copy of which contracts is hereinbefore set out and in folios 151 to 163 of the answer herein).

(That after the making of the second contract between said Ireland and said railway company the plan of said Ireland in disposing of said lands to individuals was continued, but the form of the contract between said Ireland and his grantees was changed in the manner hereinbefore described in the decision of the Commissioner of the General Land Office, and as appears at folios 164 and 165 of the answer herein, and that said Ireland would further testify that prior to the time that he made application to make proof of said lands under the fifth section of the act of March 3, 1887, as hereinbefore stated, he had made contracts with individuals for the sale and conveyance of about 50,000 acres of land, each of said contracts particularly describing the tract affected thereby, which tracts were as contracted to be sold to various parties at various prices ranging from four to seven dollars per acre).

That said Ireland would further testify (that of the land embraced within said contracts made between said Ireland and said railway company about 40,000 acres had been so contracted by said
140 Ireland to purchasers, most of whom became settlers on the various tracts purchased by them, and have obtained conveyances from said Ireland or his grantee to said lands, pursuant to their said contracts, and that about fifty individuals, beside the defendant in this action, are respectively asserting title to a one-quarter section, each, of the lands embraced within said contract between the said railway company and said Ireland, each one of whom is a qualified homesteader, and whose rights in all substantial particulars with reference to said lands are the same as those of the defendant in this action).

(That about 10,000 acres of said land originally included in the contracts between said railway company and said Ireland, are so in possession of and claimed by such homestead claimants.)

(That plaintiff claims by virtue of a conveyance of the premises

in question pursuant to one of the contracts from said Ireland first above mentioned, which contract is hereto attached and marked Exhibit "R" and made a part thereof, but neither the defendant nor any of the other persons hereinbefore described as like homesteaders, either had or claimed or claims under any such contract, but on the contrary claim the same under the United States homestead laws as hereinbefore set forth).

Said testimony and each and every part and portion thereof, and all offers thereof being subject to any and all objections to be made thereto by this defendant upon the trial of this action, and
141 objection is here and now made to each and every part of said testimony, and each and every offer above referred to, on the ground that the same and each thereof is immaterial, irrelevant, incompetent and inadmissible under the issues and pleadings, but no objection is made because the contracts referred to in the proposed testimony of said Ireland are not themselves produced. Each of the above objections is sustained.

B. F. WEBBER, *Judge.*

It is further agreed that the land in controversy was situated in one of the particular sections described in the indemnity grant heretofore referred to, and that the railroad of said railway company was constructed beyond a point coterminus with the location of this land within the time prescribed by the granting act.

Dated Oct. 2, 1900.

E. T. YOUNG,
STEVENS, O'BRIEN, COLES & ALBRECHT, *Attorneys for Plaintiff.*
F. W. MURPHY AND
THOMAS KNEELAND,
L. C. SPOONER AND
MARSHALL A. SPOONER,
Attorneys for Defendants.

142 EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May 25th,* 1869.

Register and receiver, Alexandria, Minn.

GENTLEMEN: The St. Paul & Pacific Railroad Company having filed, in connection with the public surveys, a map of their line of route from the west line of range 41 W. to Breckinridge, I herewith enclose a diagram of same lying within your district, together with the limits of the land grants of March 3d, 1857 and 1865. Being the 6 and 15, 10 and 20 mile limits, and you are hereby directed to withdraw from sale or location, pre-emption or homestead entry all the *odd* numbered sections within those limits and to increase in price to $2.50 per acre all the *even* numbered sections within the limit of 10 miles on each side of the line of route. You will make exceptions to this order in favor of *bona fide* settlers who may show

settlement prior to the receipt of this letter; in such cases you will permit the party to make proof and payment for either *odd* or *even* sections at $1.25 per acre in virtue of the act of the 27th of March, 1854, for the relief of settlers on lands withdrawn for railroad purposes.

This order will take effect from the date of its receipts at your office and you are requested to acknowledge the day it may be received.

Very respectfully, JOS. S. WILSON,
Commissioner.

143 EXHIBIT "B."

Railroad Grant. Revocation of Indemnity Withdrawals.

ST. PAUL & SIOUX CITY R. R. CO. ET AL.

It is within the authority of the department to revoke an executive withdrawal of indemnity lands.

If the indemnity withdrawal for the benefit of the St. Paul & Sioux City R. R. Co., was made under legislative direction contained in section 7, act of March 3, 1865, no legal objection can now be made to the revocation of such withdrawal, as said section is repealed by the act of September 29th, 1890.

Section four of the forfeiture act of 1890 is intended to enable the department to open to settlement and entry land formerly withdrawn for indemnity purposes; this authority is not limited by the provisions of the adjustment act of March 3, 1887.

Directions given that after due notice, all lands heretofore withdrawn for indemnity purposes under the grants in question be restored to settlement and entry. Acting Secretary Chandler to the Commissioner of the General Land Office, May 22, 1891.

On December 30, 1890, a rule was entered on certain land grant railroad companies to show cause within thirty days from receipt thereof why the several orders of withdrawal from settlement of lands within the indemnity limits of their respective grants should not be revoked and the lands therein embraced restored to settlement.

144 A copy of the rule was duly served on each of the following companies:

St. Paul & Sioux City R. R. Co.

St. Paul, Stillwater & Taylor's Falls R. R. Co.

St. Paul & Northern Pacific R'y Co.

Sioux City & St. Paul R. R. Co.

Great Northern R'y Co., (formerly St. Paul, Minneapolis & Manitoba R'y Co.)

Winona & St. Peter R. R. Co.

Hastings & Dakota R. R. Co., and

Chicago, Milwaukee & St. Paul R. R. Co.

A rule was also entered on the Iowa Railroad Land Co., successor to the land grant for the Cedar Rapids & Missouri River Company,

to show cause why the order withdrawing from settlement the lands within the indemnity limits of the grant to the State of Iowa for the benefit of the Cedar Rapids & Missouri River Railroad Company should not be revoked and the lands therein embraced restored to settlement.

Of these companies, the St. Paul & Sioux City R. R. Co., the Iowa R. R. Land Co. and the St. Paul & Northern Pacific R'y Co. have responded to the rule by filing written reasons why the orders revoking the withdrawals should not be made.

The St. Paul & Sioux City R. R. Co. state that the withdrawal of the indemnity lands for their benefit was made under the provisions of the act of Congress approved March 3, 1887, (11 Stat. 195), and of the seventh section of the act of May 12, 1864, (13 Stat. 72), and that neither said section nor the act of March 3, 1857, is men-
145 tioned in nor repealed by the fourth section of the act of September 29, 1890, (26 Stat. 496).

Upon examination, it appears that neither the act of March 3, 1857, nor the seventh section of the act of May 12th, 1864, directs the Secretary of the Interior to withdraw from market or entry the lands within the indemnity limits of the grant to said company. It appears that the indemnity withdrawal for the benefit of this company was not revoked in 1887, when the company was cited to show cause, etc., because it was claimed in answer to said citation as a reason why said revocation should not be made, that the seventh section of the act approved March 3, 1865, (13 Stat., 526), was a legislative withdrawal of lands in the indemnity limits of their grant, and consequently the Land Department had no power, in the absence of legislative action, to revoke the order of withdrawal made by direction of Congress.

The department was in some doubt by reason of the language of said section 7, as to the power to revoke the order. All doubt has since been removed by the passage of the act of September 29, 1890, *supra*, the fourth section of which repeals section 7 of the act of 1865, *supra*.

It is now contended by the company that neither the act of 1857 nor 1864 was repealed by the fourth section of the forfeiture act of 1890; this contention is not material, since nowhere in either of these acts is the Secretary of the Interior directed to withdraw lands within the indemnity limits for the benefit of this
146 company. Nothing is found in the acts of 1857 and 1864 to prevent the Secretary of the Interior from revoking orders of withdrawal heretofore made.

If the withdrawal in question was made in pursuance of legislative grant found in section seven of the act of 1865, no legal objection can now be made to the revocation of that said order, since said section seven has been repealed. If the withdrawal in question was made by virtue of the original authority over such matters possessed by the Secretary of the Interior in the exercise of his discretion, then were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed ex-

actly in the position which the law gave it and deprived of no rights acquired thereunder. It would still have its right to select indemnity for lost lands, but it would have no advantage over the settler. (Atlantic & Pacific R. R. C., 6 L. D. 84.)

The St. Paul & Sioux City R. R Co. further says that the fact that the grant to it remains unadjusted is not its fault, but is due to the failure of the Government to determine all the questions presented by the grant and the definite location of the line of the road under it, and that it would be unjust to revoke the order of withdrawal before the grant is finally adjusted. This assertion is without force. These lands have been withdrawn from settlement for many years, long enough, it would seem, for the company to have ascertained its loss in place and selected its lieu lands therefor.

147 The Iowa R. R. Land Co., successors in interest to the Cedar Rapids & Missouri R. R. Co., state as reasons why the order of withdrawal of indemnity lands should not be revoked, that the fourth section of the act approved September 29, 1890, (26 Stat. 496), which repeals so much of the provisions of section fourth of the act approved June 2, 1864, (13 Stat. 95), as required the Secretary of the Interior to reserve no lands but the odd numbered sections within the six miles granted limits of the roads mentioned in said act of June 2, 1864, or the act of which the same is amendatory, should be construed in connection with and as following the adjustment act of March 2, 1887, (24 Stat. 556), which provides for the adjustment of the land grants made by Congress to aid in the construction of railroads; that it is against both the letter and spirit of the adjustment act to restore any lands to market which might or may be found to be required to satisfy the grant to said road as to quantity; that this authority conferred upon the Secretary of the Interior to revoke the withdrawals heretofore made by statutory direction should only be invoked when the grant to said road has been adjusted under the adjustment act of 1887.

This company has had the exclusive control over the lands in the indemnity belt for more than twenty years, and it cannot be contended that it has not had ample opportunities to have ascertained and secured its rights under said grant.

148 If Congress intended at the time of making the grant for the benefit of the Cedar Rapids & Missouri River R. R. Co., that the Government should withdraw from settlement the lands in the indemnity limits of their grant, it is evident that the part repealing "so much of the provisions of section 4, of the act approved June second, eighteen hundred and sixty-four, (13 Stat. 95), as required the Secretary of the Interior to reserve no lands but the odd numbered sections within the six miles granted limits of the roads mentioned in said act," Congress indicated its willingness to have the indemnity withdrawals revoked so that the railroad companies and their successors could not occupy such lands in a state of indefinite withdrawal to wait their pleasure or convenience.

Section 4 of the forfeiture act was evidently passed by Congress for the purpose of enabling the department to open these and other

lands to settlement without any special reference to the adjustment act.

In my opinion the Iowa R. R. Land Co. has assigned no sufficient reason why the revocation of the order of withdrawal should not be made.

The St. Paul & Northern Pacific R'y. Co., in answer to the rule entered against them to show cause why the order of withdrawal for the benefit of said company should not be revoked, say there was no vacant lands within the stated indemnity limits of their grant and that by reason of unavoidable litigation with the St. Paul, Minneapolis & Manitoba Railroad Company, and the fact that the Government has failed to determine the questions presented
149 adjudging the rights of said company under its grants, this company has been unable to secure its selected lands, and it claims that it should have a reasonable time within which to select up to the limit of its full quantity. In addition to the reasons before set out the company assigns a number of general reasons why the revocation of the orders of withdrawal would effect it injuriously.

I am unable to see from an examination of the answer submitted by the company any sufficient reason why the orders of withdrawal should not be revoked. If, as the company asserts, there are no vacant lands which would be thrown open to settlement by the revocation, then the company would lose nothing by it.

The other companies cited to discharge the rule entered against them have made no response.

There is probably but a small amount of vacant unappropriated land within the indemnity limits of some of the above named roads, still the withdrawals remain in force and are obstacles in the way of law-abiding citizens who may desire to settle upon the lands within the indemnity limits of said road. I, therefore, direct that after giving the usual notice, all lands under withdrawals heretofore made and held for indemnity purposes under the grants to said roads be restored to the public domain and open to settlement and entry in accordance with the rules heretofore established in similar cases.

150 EXHIBIT "C."

64814 1/2/91. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 28, 1891.

Register and receiver, St. Cloud, Minn.

SIRS: Under instructions from the honorable Secretary of the Interior, dated May 22, 1891, you are directed to restore to the public domain and open to settlement and entry, all lands heretofore withdrawn in your district within the indemnity limits of the grant for the St. Paul, Minneapolis & Manitoba Railway Company and not embraced in selections heretofore made or applied for by said com-

pany, but this restoration shall not affect the rights acquired by grantees within the primary limits of any other congressional grant.

Notice of such restoration will be given by public advertisement, for a period of thirty days, in some newspaper having general circulation in your district, and in such notice a date should be set (not less than thirty days from the date of the notice) when the lands will be open to entry.

A copy of the newspaper containing the notice should be promptly forwarded for the information of this office.

The receiver, as disbursing officer, will pay the costs of
151 publication, and should forward a copy of the notice, with proof of publication, as his voucher for the disbursement.

Any rejected lists by the company pending on appeal before this office, should be noted upon your records, as such lands are not included in the restoration, and in the event that any such lists are not noted upon your records, they will be returned to you for that purpose upon application.

In the disposition of application for lands embraced in pending selections by said company, you will be governed by the rules established for the disposition of applications under the orders of August, 1887, viz:

Applications to make entries upon lands covered by unapproved selections may be received, noted, and held subject to the claims of the company, of which the applicant must be distinctly informed and memorandum thereof entered upon his papers, but such entries must not be permitted to go to record.

Whenever such application is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of such notice within which to present objections to the allowance of said entry.

Should the company fail to respond or show cause within the time allowed, said application to make entry will be admitted, and the selection held for cancellation; but should the company
152 appear and show cause, an investigation will be ordered, under the rules of practice, to determine whether said land is subject to the right of the company to make selections of the same, which will be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to this office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in favor of the company, and no appeal be taken, the land will be certified to the Secretary of the Interior for approval for patent without requiring further action on the part of the company, except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be cancelled and the filing and entry allowed, subject to compliance with law.

Lands which have not been selected, will be subject to settlement

and entry, as other public lands, and notice to the company will not be required.

Very respectfully, W. M. STONE,
Acting Commissioner.

EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March 21st*, 1894.

1307)
1569) 1894.

To the Commissioner of the General Land Office.

153 SIR: In the matter of the adjustment of the grants claimed by the St. Paul, Minneapolis & Manitoba Railway Company under acts of Congress of March 3, 1857, (11 Stat. 195); March 3, 1865, (13 Stat. 526), and March 3, 1871, (16 Stat. 588), I am in receipt of a letter from Samuel Hill, president of said company, requesting that any excess in selections that may appear upon the adjustment of the mail line of their road under the present rulings of the department be not cancelled, but suspended until its rights thereto can be judicially determined by the courts.

In addition to the grant for a main line "from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Bigstone lake and the mouth of the Siouxwood river" grants have been made, by the above legislation referred to, for a branch line from St. Cloud to Crow Wing and thence to Brainerd, and for a branch line from St. Cloud to St. Vincent, in the State of Minnesota.

The Manitoba Company claims the grant made to aid in the construction of the main line, a portion of the branch to Brainerd, and the St. Vincent Extension branch.

Under the early rulings of this department it was held that these grants should be adjusted as an entirety, but under the construction placed by this office upon the decision of the supreme court in the case of the St. Paul & Pacific *v.* Northern Pacific Railroad Co. (139 U. S., p. 1), it was held that the grant for the St. Vincent
154 extension is a new grant, made by act of Congress subsequent in date to those by which the original grant was made for the main line, and that the grant for the said St. Vincent extension should not be adjusted in connection with the other grants as an entirety (13 L. D. 353).

Within the limits of the withdrawal along the main line there was found to be a large amount of lands reserved in excess of that necessary to satisfy said grant, but along the St. Vincent extension it is represented that if the company received all available lands, it would yet be deficit many thousand acres. It is admitted by the company that your adjustment of the main line will show that selections have been made within the limits of said main line in excess of the amount necessary to satisfy that grant, which excess is given at about 200,000 acres. It is claimed by the company that this ex-

cess in selection is on account of the deficiency that will remain after receiving all available lands on account of the St. Vincent extension, and that it has a right to resort to the lands within the limits of said main line to satisfy such deficiency. It is the selection of these lands that the company asks be not cancelled upon the adjustment of the main line.

In support of its request, copy of an interlocutory decree is filed, given in the case of the St. Paul & Northern Pacific Railroad Company *v.* The St. Paul, Minneapolis & Manitoba Railway Company *et al.*, which is claimed to be favorable to the contention of the company. Without passing upon the question as to the
155 effect any judgment rendered in said case might have upon the present question, I deem it advisable and direct that action upon any excess in selection along the main line be suspended until further advised by this department. It is not intended hereby to interfere with the adjustment of said grants which may proceed in due course, except as above specially directed.

The company's request and accompanying papers are herewith enclosed to be placed on file in your office, together with other papers relating to the grant of said company.

Very respectfully, HOKE SMITH, *Secretary.*

EXHIBIT "E."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October 1st*, 1895.

The Commissioner of the General Land Office.

SIR: Under date of March 21st, 1894, you were directed to suspend action until further advised by this department, upon any excess in selections along the main line of the St. Paul, Minneapolis & Manitoba railway.

This action was taken upon the request of the company which was accompanied by a copy of an interlocutory decree filed in the case of the St. Paul & Northern Pacific R. R. Co. *vs.* St. Paul, Minneapolis & Manitoba R'y Co., *et al.*, in which it was expressed
156 as the opinion of the court that the grants made by the acts of March 3, 1857, March 3, 1865, and March 3, 1871, are an entirety and indivisible. Said cause was pending in the circuit court of the United States for the district of Minnesota, and its decree was in favor of the St. Paul & Northern Pacific Railroad Company.

Upon appeal to the circuit court of appeals for the eighth circuit, the decree of the circuit court was reversed and the cause was remanded to that court with direction to dismiss the bill of complaint. See unbound volume 68 Fed. Rep. No. 1, page 2.

Under the early rulings of this department the grants made by the acts of 1857, 1865 and 1871, were held to be indivisible, but following the decision of the Supreme Court in the case of St. Paul & Pacific R. R. Co. *vs.* Northern Pacific R. R. Co., (139 U. S. 1), it

was held that the grant for the St. Vincent extension of the Manitoba railway, or the grant made by the act of 1871, was a new grant subsequent in date to those by which the original grant was made for the main line of said road, and that the grant for said St. Vincent extension should not be adjusted with the grants of 1857 and 1865 (13 L. D. 353).

It was admitted by counsel that an adjustment following the directions given in 13 L. D. 353 would show an excess in selections along the main line of almost two hundred thousand acres, but it was urged that the same would but compensate in part for the great deficiency which would be found to exist along the St. Vin-
157 cent extension, and in view of the holding made by the circuit court, it was requested that the excess found along the main line be not cancelled, but suspended, to await the decision of the court of appeals.

As before stated, the court of appeals reversed the decree of the circuit court without considering the question as to the divisibility of the several grants claimed by the Manitoba Railway Company.

After a careful consideration of the matter, I have concluded to revoke the previous order of suspension made in departmental letter of March 21st, 1894, and have therefore to direct that the adjustment of these grants be proceeded with under the direction given in 13 L. D. 353.

Very respectfully, HOKE SMITH, *Secretary.*

EXHIBIT "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 13th*, 1896.

Mr. Thomas R. Benton, att'y St. P., Minn. & M. R'y Co., St. Paul, Minnesota.

SIR: You are hereby directed to show cause, at once, why the suspension made in October last of action upon indemnity selections of lands made by the St. Vincent extension of the St. Paul, Min-
158 neapolis & Manitoba Railway Company, for losses sustained along the main line of said road, should not be removed, and the applications of settlers to make homestead entries for said lands be taken up and considered in connection with said selections.

This is a matter of importance to settlers and homestead applicants, and demands immediate attention.

Very respectfully, S. W. LAMOREUX,
Commissioner.

EXHIBIT "H."

Letter "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 10, 1896.

S. P., M. & M. R. R. list 4 (indemnity) and rearrangements.

Register and receiver, Marshall, Minnesota.

SIRS: On October 16, 1883, the St. Paul, Minneapolis & Manitoba Railway Company filed in your office (Benson) indemnity list, No. 4, of selections on account of its grant by acts of March 3, 1857, (11 Stat. 195), and March 3, 1865, (13 Stat. 526), embracing 136,325.28 acres.

These selections were along the main line of its road from St. Paul to Breckinridge, and the bases therefor which were given in
159 bulk, were also along the main line of said road. On March 7, 1889, there were patented in the company 12,104.78 acres of these lands.

As some 67,000 acres of the land so selected fell within the limits of the grant by act of July 4, 1866, (14 Stat. 87), for the Hastings & Dakota Railroad Company (partly within the primary and partly within the indemnity limits) it becomes necessary to determine the rights of the companies therein, and, on September 11, 1869, this office rendered a decision wherein it awarded such of the lands as fell within the primary limits of the Hastings & Dakota Company to that company, and the balance which were found within the indemnity limits common to both grants, to the Manitoba Company. Both companies appealed and the matter was duly submitted to the department.

While the case was pending in the department in July, 1891, the Manitoba Company, believing the losses designated on the main line in the selection of October 16, 1883, had already been satisfied, filed a new list of losses, the latter being along the St. Vincent branch of its road, the grant for which was made by the act of March 3, 1871, (16 Stat. 588).

On October 23, 1891, the Secretary rendered his decision in the case wherein he affirmed the decision of this office awarding the Hastings & Dakota Company the tracts within the primary limits of its grant, but reversed said decision as to the tracts within the indemnity limits common to both grants, holding that the designations of losses along the St. Vincent branch could not be
160 accepted as a basis for selections along the main line, and that such selections being unsupported must be cancelled.

Thereupon, and on November 12, 1891, the selection of the Manitoba Company of October 16, 1883, within the overlap with the primary limits of the Hastings & Dakota grant were cancelled, and on December 12, 1892, a further cancellation of like status was made pursuant to the decision of the Secretary of the Interior of November 30, 1892.

On October 19, 1893, a further cancellation of the selections of October 16, 1883, was made of lands lying within the common indemnity limits of the two grants.

On June 6, 1894, the Manitoba Company filed again a rearranged list of No. 4 of the selections of 1883, which was practically the same as that filed in July, 1891, there being a difference of but forty acres in the acreage.

On March 21, 1894, the Secretary of the Interior directed that no further cancellations of selections of this character be made, but that the same be suspended until further directions by the department, and on October 1st, 1893, he revoked the order of March 21, 1894, and directed that the adjustment of the grants be proceeded with.

Subsequently a further suspension was made of said selections, but on January 13, 1896, the company was called upon to show cause why the suspension should not be removed and action on the selection proceeded with. No response was made.

161 Therefore, as under the well settled rulings of the department in this and other cases, there is no valid basis for the selections as they at present exist, such basis being upon the St. Vincent branch, while the selections are along the main line, such of the said selections in the lists of October 16, 1883, July 27, 1891, and June 6, 1894, as remain unpatented and uncancelled are hereby held for cancellation, subject to appeal within sixty days.

A large portion, if not all, of these lands are claimed by John Ireland, under the act of March 3. 1887, as a purchase from the company, and by homestead claimants, many of whom have been allowed to make entry, and their claims will receive due consideration should this decision become final.

Advise all parties in interest of this decision, and report promptly at the expiration of the time allowed for appeal.

Very respectfully,

E. F. BEST,
Acting Commissioner.

On the back of this letter appears this in Register Shepherd's hand: Notified as follows by reg. letter: July 16, 1896.

W. C. Bicknell, Morris, Minn.
M. D. Taylor, St. Cloud, Minn.
S. H. Hudson, Benson, Minn.
Hayden French, Ortonville, Minn.
Brand & Partridge, Graceville, Minn.
Thos. R. Benton, St. Paul, Minn.
60 days allowed for appeal.

162 Reported Sept. 29, 1896, that no motion on appeal filed.

EXHIBIT "H-1."

Copy of Letter 7-17-96.

In re Indemnity List No. 10, St. P., M. & M. R'y Co. Selection, 4-22-85; held for cancellation 7-17-96, and cancelled 10-23-96.

Register and receiver, St. Cloud, Minn.

SIRS: On April 22, 1885, the St. P., M. & M. R'y Co. filed in your office (then Fergus Falls) indemnity list, No. 10, of selections on account of its grant by acts of March 3, 1857, (11 Stat. 195), and March 3, 1865, (13 Stat. 526), embracing 50,966.40 acres of land. A preliminary list No. 10, dated 4-9-85, embracing nearly all the lands in the list of 4-22-85 is on file with the latter, but as differences between the lists exist and in neither are designations of losses given, tract for tract, the latter must be held to have superseded the former.

These selections lie along the main line of the company's road from St. Paul to Breckinridge, and the bases therefor originally designated, and given in bulk, were also along such line.

163 On March 7, 1889, there were patented for the company of these selections 23,668.54 acres, and on Aug. 15, 1891, the company filed a new designation of losses for the selections not patented, but the new losses are located along the St. Vincent branch of the company's road, the grant for which was made by the act of March 3, 1871, (16 Stat. 588).

By the filing of the list of August 15, 1891, giving a different and entirely new basis, the company abandoned its original selection, and it must stand or fall by the substituted list.

On October 23, 1891, (13 L. D. 440), the Secretary of the Interior, having a precisely similar state of facts before him, held that "a specification of losses on the line of the St. Vincent extension cannot be accepted as the basis for the selections on the main line of the St. P., M. & M. Co." This principle has since been affirmed and is now well settled.

On March 21, 1894, however, in a letter addressed to this office, the department directed that no further cancellation be made of the Manitoba Company's selections of this character, but that such selections be suspended until further directed; and on October 1, 1895, he revoked the order of suspension and directed that the adjustment of the grant be proceeded with.

Subsequently there was a further suspension of said selections, but on January 13, 1896, the company was called upon to show cause why such suspension should not be removed and action on the selections proceeded with. No response was made.

164 In view of these facts and of the well settled rulings of the department in this and other similar cases, there is no valid basis for the selections as they at present exist, such selections being along the main and the basis along the St. Vincent branch, and the list of April 9, 1885, and April 22, 1885, and of August 15, 1891, in

so far as the selections are still pending, are held for cancellation subject to appeal.

A large portion, if not all, of these lands have been applied for by parties claiming them under the settlement laws of the United States, and by John Ireland, claiming under the act of March 3, 1887, as a purchaser from the Manitoba Company.

Should this decision become final, the claims of all the parties will receive due consideration before any disposal of the land is made.

Advise the parties in interest of this decision, and report promptly at the expiration of the time allowed for appeal.

Very respectfully, E. F. BEST,
Assistant Commissioner.

(Endorsed on back of letter by land office at St. Cloud:)
Thos. R. Benton, att'y, notified by reg. letter 7-22-96.
No action taken.
Reported Oct. 14, 1896.

165 EXHIBIT "I."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 23, 1896.

Register and receiver, Marshall, Minnesota.

SIRS: This office is in receipt of your letter of September 29, 1896, enclosing evidence of service of notice, and reporting that no appeal had been filed by the St. Paul, Minn. & Man. R'y Co. from office decision of July 10, 1896, holding for cancellation its list of selections No. 4, for such tracts therein as still remain of record and uncancelled.

The said decision is accordingly declared to be final, and the said list cancelled on the records of this office. So note on the records of your office.

A large portion of these lands are claimed by John Ireland under act of March 3, 1887, as a purchaser from the company, and by homestead claimants, many of whom have been allowed to make entry. These claims will receive due consideration at as early a day as practicable.

Very respectfully, S. W. LAMOREUX,
Commissioner.

166 EXHIBIT "I-1."

(*Copy of Letter F of Oct.* 23, 1896.)

Register and receiver, St. Cloud, Minn.

SIRS: This office is in receipt of your letter of Oct. 14, 1896, endorsing evidence of service of notice and reporting that no appeal has been filed from office decision of July 17, 1896, by the St. P., M.

& M. R'y Co., which held its list of selections No. 10 for cancellation for such tracts embraced therein as still remain of record.

The said decision is accordingly declared to be final and the tracts in said list cancelled on the records of this office. You will so note on your record.

A large portion of these lands have been applied for by parties claiming them under the settlement laws, and by John Ireland, who claims under act of March 3, 1887, (25 Stat. 556), as a purchaser from the St. P., M. & M. R'y Co.

No disposal will be made of these lands until the above claims are adjudicated by this office. So advise the parties in interest.

Yours respectfully, S. W. LAMOREUX,
Commissioner.

(Endorsed on back:) Thos. R. Benton, att'y, notified 10–26–96.

167 EXHIBIT "J."

"*Application to Purchase Land in Accordance with the Fifth Section of the Act of Congress Approved March* 3, 1887.

No. —.

LAND OFFICE AT ST. CLOUD, MINNESOTA.
February 8th, 1896.

I, John Ireland, of the city of St. Paul, Minnesota, do hereby apply to purchase in accordance with the fifth section of an act of Congress, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, (24 Stat. 556), all of the lands north of base line and west of the fifth principal meridian," (here followed a description of the land described in the complaint and answer herein and of other lands), "containing twenty-two thousand and five hundred and sixty-four hundredths (22,560.64) acres, according to the returns of the surveyor general, for which I offer to give at the rate of one dollar and twenty-five cents ($1.25) per acre.

JOHN IRELAND, *Applicant.*

168 EXHIBIT "K."

DEPARTMENT OF THE INTERIOR, J. V. W.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 24, 1896.

Register and receiver, Marshall, Minnesota.

SIRS: On March 20, 1896, John Ireland filed application to purchase under the fifth section of the act of March 3, 1887, the lands described as follows, to-wit:

N. E. ¼, sec. 1, T. 123, R. 45.
E. ½, sec. 5, T. 123, R. 45.

S. E. ¼, sec. 11, T. 123, R. 45.
S. E. ¼, S. E. ¼, N. ½, S. E. ¼, N. E. ¼ and S. W. ¼, sec. 13, T. 123, R. 45.
E. ½, sec. 15, T. 123, R. 45.
All of sec. 22, T. 123, R. 45.
All of sec. 35, T. 123, R. 45.
All of sec. 1, T. 124, R. 45.
S. E. ¼, and N. ½, sec. 3, T. 124, R. 45.
S. ½, of sec. 5, T. 124, R. 45.
Lots 2, 3, 4, 5, and E. ½, sec. 7, T. 134, R. 45.
S. E. ¼, sec. 9, T. 124, R. 45.
N. E. ¼ and W. ½, T. 124, R. 45.
N. W. ¼, N. W. ¼, S. ½, N. W. ¼ and S. ½, sec. 13, T. 124, R. 45.
All of sec. 15, T. 124, R. 45.
N. E. ¼ and W. ½, sec. 17, T. 124, R. 45.
169 N. E. ¼, N. E. ¼, W. ¼, N. E. ¼, S. E. ¼, and lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, sec. 19, T. 124, R. 45.
N. E. ¼ and S. W. ¼, sec. 21, T. 124, R. 45.
S. W. ¼ of sec. 23, T. 124, R. 45.
S. ½ of sec. 27, T. 124, R. 45.
Lots 1 and 3, and W. ½, N. E. ¼, sec. 29, T. 124, R. 45.
N. E. ¼, sec. 33, T. 124, R. 45.
S. W. ¼, sec. 1, T. 124, R. 46.
W. ½ of sec. 3, T. 124, R. 46.
S. E. ¼ and N. ½, sec. 11, T. 124, R. 46.

And on the following day filed a notice of his intention to make proof of his right to purchase said land. You rejected his application to make entry and also refused to allow him to publish his notice of intention to make proof. He appealed and his papers were transmitted with your letter of May 2nd, 1896.

It was the intention of the applicant to file these papers together, they being part of and relating to the same proceeding. He did not expect to be allowed to enter until after he had established his right to do so, and accordingly applied to make the necessary proof for that purpose, and for the purpose of protesting himself and his vendees, should a decision adverse to the railroad claim be rendered.

The claim of the St. Paul, Minneapolis & Manitoba Railway Company to these lands (from which Ireland claimed to have purchased) has now been rejected and its selections thereof were cancelled on October 23, 1896, and there is now no objection to the allow-
170 ance of his application to make proof of such purchase after the usual publication of his notice to do so.

You will accordingly advise him that he may now come forward and make such publication, being careful that in addition to the published notice, all parties now known, or who may become known before the closing of the case before you, to be adverse claimants to any of said lands, are given special notice thereof.

The tracts applied for are all within a few miles of each other, and are so great a distance from your office, the proof should be made in their vicinity to enable the adverse claimants to appear

and make such showing as they may desire without unnecessary expense; and, as it is probable there will be a great number of protestants, and that the hearing will consume considerable time, the officer before whom the testimony shall be taken, may within his directions, summon each day only such of the adverse claimants, the taking of whose testimony will consume the day, and he will have power to continue the case from day to day until all the testimony is in. When such testimony shall be received at your office, you will render your decision thereon, and in due time, transmit all the papers to this office.

The application of Ireland is returned to you herewith.

Very respectfully, S. W. LAMOREUX,
Commissioner.

171 EXHIBIT "K–1."

Copy of Commissioner's Letter "F," 10–24–96.

Register and receiver, St. Cloud, Minn.

SIRS: With your letter, March 20, 1896, you transmitted the application of John Ireland to make proof of his right to purchase under the fifth section of the act of March 3, 1887, (24 Stat. 556), of the following land:

(Here follows list of lands including
S. E. ¼ and W. ½ of sec. 9, T. 125, R. 45, and
S. E. ¼ and N. ½ of sec. 15, T. 125, R. 45.)

You refused the application for the reason that the lands now covered by indemnity selections made by the St. P., M. & M. R'y Co., on account of its St. Vincent Extension branch, and asked instructions.

By letters of July 17th, and July 18th, last, the lists of the company containing these lands, 10 and 11, Fergus Falls, and No. 7, of your office, were held for cancellation, and on Oct. 23, 1896, were cancelled, no appeal from said decision having been taken.

Therefore, there is now no objection to the allowance of the application of Ireland to make proof of his purchase after the usual publication of his notice of intention to do so, and you will accordingly advise him that he may now come forward and make such publication, being careful that in addition to the published notice,

172 all parties now known, or who may become known before the closing of the case before you, to be adverse claimants to any of said lands, are given special notice thereof.

The tracts applied for are all within a few miles of each other and are so great a distance from your office that the proof should be made in their vicinity to enable the adverse claimants to appear and make such showing as they may desire without unnecessary expense, and, as it is probable there will be a great number of protestants and that the hearing will consume considerable time, the officer before whom the testimony shall be taken, may, within his discretion, summon each day only such of the adverse claimants, the taking of whose

testimony will consume the day, and he will have power to continue the case from day to day until all the testimony is in.

When said testimony shall be received at your office, you will render your decision thereon, and in due time transmit all the papers to this office.

The application of Ireland was returned to you with office letter of April 11th, last.

Very respectfully, S. W. LAMOREUX,
Commissioner.

EXHIBIT "L."

U. S. LAND OFFICE, ST. CLOUD, MINNESOTA.

The annexed papers were filed by Jacob Gertgens, the day and hour noted thereon.

173 Rejected Dec. 2, 1895, because the land applied for is in the twenty-mile indemnity limits of the St. P., M. & M. main line grant and was selected by said company April 22, 1885.

Notice.

——, 189–.

I hereby acknowledge due service of notice of the decision in this case and of my right of appeal within 30 days.

—— ——.

By registered letter Dec. 16, 1895.
Appeal filed Dec. 31, 1895.

THEO. BRENNER, *Register.*

EXHIBIT "O."

Notice of Intention to Make Proof of Right to Purchase under the Fifth Section of the Act of Congress Approved March 3, 1887.

To the register and receiver, United States district land office, St. Cloud, Minnesota.

GENTLEMEN: You are hereby notified that the undersigned, John Ireland, of St. Paul, Minnesota, by virtue of certain agreements and contracts entered into and made July 17, 1880, and March 30, 1883, by and between him, the said Ireland, and the St. Paul, Minneapolis & Manitoba Railway Company, claims the right to pur-

174 chase from the United States, as provided by the fifth section of an act of Congress approved March 3, 1887, (24 Stat. 556), the several pieces or parcels of land hereinafter described, lying within the county of Traverse, in the State of Minnesota, and subject to the jurisdiction of said United States district land office at St. Cloud, Minnesota, which lands are a part and parcel of the lands embraced within the indemnity limits of the grant or grants made

by acts of Congress approved March 3, 1857, (11 Stat. 195), and March 3, 1865, (13 Stat. 526), to the Territory and State of Minnesota to aid in the construction of a railroad "from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river," which grant or grants the State conferred upon the St. Paul, Minneapolis & Manitoba Railway Company, and which railroad is now known as the "Main" or "Breckinridge" line of said company. Further, said Ireland will appear before you, at your office in St. Cloud, on such day as you may fix, to make proof, in the manner prescribed by official circular of February 13, 1889, (8 L. D. 348), of his right, as aforesaid, to purchase said lands, specifically described as follows, to wit: "(Here followed a description of the land described in the complaint and answer herein with that of other lands)," containing in the aggregate 22,560.44 acres.

There has been, so far as said Ireland is informed, no formal declaration by the Secretary of the Interior, or other competent
175 authority, that said lands or any of them, were excepted from the grant for railroad purposes, and the St. Paul, Minneapolis & Manitoba Railway Company's selections, embracing the same, may be properly considered as adverse claims of record. The said Ireland believes, however, that the said selections are of the same character as, and stand upon no better footing than, those considered by the Secretary of the Interior in his decision of October 25, 1891, (13 L. D. 440), and that they are liable to cancellation at any time, under the rule and for the reason stated in said decision. Therefore, said Ireland, a purchaser of said lands, in good faith, from said company, seeks by this proceeding to protect his rights and interests in the same in the manner provided by law, and in accordance with regulations prescribed by the Land Department.

The following named persons have entries or application for entry pending for parts of said lands herein described, and theirs are claims of record, viz: Frank W. Watkins, of Adelaide; Ernest E. Trepina, of Brown's Valley; Louis N. Johnson, of Big Stone; Louis A. Westphal, of Johnson; Bernard Peyton, Richard Peyton and Hugh Peyton, of Collis; Luke L. Rowan, John W. Ginnaty, Thomas F. O'Pahlen and John J. Rowan, of Graceville; John E. Allmen, Edward Burke, Herman Greger, Fred Utrecht, Edward Kalding, Frank Seifert, Wilhelm Krenz, Christian Jenson and Richard Wall, of Dumont; Fred Wilkins, Thomas Peyton, Julius Nott, Archibald Burton, John Harps, Herman J. Burggraf, John
176 Weinkes, Joseph Wilhelm, Frank Wilhelm, Daniel C. Terpina, John B. Fallin, Att'y Peyton, Gustus Zell, John Sullivan and John Will, of Wheaton, all in the State of Minnesota.

In the notice of this proceeding, which by law and official regulations you are required to publish in a newspaper near the land and to post in your office, please make said railway company and each and all of the persons named in the preceding paragraph parties and specifically cite each and every one of them to appear, at the time and place fixed for hearing the proof to which this notice

relates, and present objection, if any they have, to the submission of such proof or consummation of title to said lands by the said Ireland in the manner here proposed.

Very respectfully,

JOHN IRELAND, *Applicant*,
By CHARLES H. BABBITT, *Attorney*.

Witnesses:
JAMES STODDARD,
Of St. Paul, Minn.
JOHN P. O'CONNOR,
Of St. Paul, Minn.
M. J. McDONALD,
Of Graceville, Minn.
MAURICE GREEN,
Of Graceville, Minn.

EXHIBIT "O–1."

(4–406.)

Certificate No. 19778.

177 The United States of America to all to whom these presents shall come, Greeting:

Whereas, John Ireland, of Ramsey county, Minnesota, has deposited in the General Land Office of the United States a certificate of the register of the land office at St. Cloud, Minnesota, whereby it appears that full payment has been made by the said John Ireland, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the southwest quarter of section nine, in township one hundred and twenty-five north, of range forty-five west, of the fifth principal meridian in Minnesota, containing one hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John Ireland.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John Ireland, and to his heirs, the said tract above described; to have and to hold the same, together with all the rights and privileges, immunities, and appurtenances of whatsoever nature, thereunto
178 belonging, unto the said John Ireland and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-first day of December, in the year of our Lord one thousand and eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

By the President,

[SEAL.]

WILLIAM McKINLEY,
By F. M. McKEAN, *Secretary.*
C. H. BUSH,
Recorder of the General Land Office.

Recorded vol. 221, page 412.

EXHIBIT "R."

(This agreement, made and entered into this third day of March, A. D. 1898, by and between John Ireland, of St. Paul, Minnesota, of the first part, and John T. O'Connor, of St. Paul, Minnesota, of the second part;

Witnesseth, that said party of the first part, in consideration of the covenants and agreements of said party of the second part, hereinafter contained, hereby sells and agrees to convey unto said party of the second part, or his assigns, by deed of St. Paul, Minne-
179 apolis & Manitoba Railway Company, upon the prompt and full performance of said party of the second part of his part of this agreement, the following described premises, situate in the county of Traverse and State of Minnesota, to-wit:

The southeast quarter (S. E. ¼) and west half (W. ½) of section nine (9) in town 125, range 45, containing 480 acres more or less, and other lands, in all containing 5,713.62 acres, more or less.

And said party of the second part, in consideration of the premises, hereby agrees to pay said party of the first part as and for the purchase price of said premises, the sum of $22,854.48 *dollars* in manner and at times following, to-wit: $54.84 upon the execution of this contract; $5,800.00 30 days after title has been secured for the above described premises by the said St. Paul, Minneapolis & Manitoba R'y Co., or by the said John Ireland, party of the first part; $6,000.00 one (1) year after said title has been secured; $6,000.00 two (2) years after said title has been secured, and $5,000.00 three (3) years after said title has been secured, and to pay all taxes or assessments that may hereafter be levied or assessed upon said premises, with interest at the rate of seven per cent. (7 per cent.) per annum, payable annually upon the whole sum from time to time remaining unpaid. Interest to commence when title for the above described premises is secured by the said St. Paul, Minneapolis & Manitoba R'y Co., or by the said John Ireland, party of the first part.

180 But should default be made in the payment of said several sums of money, or any or either of them, or any part thereof, or in the payment of said interest or taxes, or any part thereof, or in any of the covenants herein to be by said party of the second

part kept or performed, then this agreement to be void at the election of said party of the first part, time being of the essence of this agreement. And in case of default by said party of the second part, in whole or in part, in any or either of the covenants of this agreement, to be by him kept and performed, he hereby agrees upon demand of said party of the first part, quietly and peaceably to surrender to him possession of said premises and every part thereof, it being understood that until such default, said party of the second part to have possession of said premises. It is further agreed in case the premises above described are granted or conveyed by the United States to any person other than the said St. Paul, Minneapolis & Manitoba Railway Company, or the said John Ireland, party of the first part, and by reason thereof the party of the first part is unable to convey or cause to be conveyed the above described premises thereof to the party of the second part, this contract shall become null and void, and the payment which has been made at the execution of this contract, shall be forfeited to the party of the first part.

181 In testimony whereof, said parties hereto have hereunto respectively set their hands and seals the day and year first above written.

JOHN IRELAND. [SEAL.]
JOHN P. O'CONNOR. [SEAL.]

In presence of—
EDWARD QUINLIVAN.)

Signed, sealed and delivered

Findings and Decision.

STATE OF MINNESOTA, }
County of Traverse. }

District Court, Sixteenth Judicial District.

JOHN P. O'CONNOR, Plaintiff, }
vs. }
JACOB GERTGENS, Defendant. }

The above entitled action was duly submitted to the court for decision upon the pleadings, written stipulation of facts hereto attached and hereby made a part of these findings, marked Exhibit 2, and oral and written agreement of counsel; and the court, having duly considered the same, now finds the following facts:

First. That each and every fact set forth in said stipulation of facts (Exhibit 2) is true.

Second. That each and every allegation of the pleadings, except as set forth in said stipulation or admitted in the pleadings, is false and untrue.

182 As conclusions of law from the foregoing facts, the court finds:

First. That the plaintiff, John P. O'Connor, as against the defendant, is, and at the time of the commencement of this action was, the owner in fee simple of the land described in the complaint, to-wit: The southwest quarter of section nine (9), township one hundred and twenty-five (125), range forty-five (45) west, of the fifth principal meridian, in the county of Traverse and State of Minnesota.

Second. That the defendant, Jacob Gertgens, has no right, title, estate, claim, lien or interest in or to said land or any part or portion thereof.

Third. That the plaintiff is entitled to recover of defendant the immediate possession of said land and to have immediate restitution thereof and the whole ther-of.

Fourth. That the defendant is not entitled to the relief demanded in the answer nor to any relief whatever.

Fifth. That the plaintiff is entitled to recover of defendant his costs and disbursements herein.

Let judgment be entered accordingly.

Dated March 25th, 1901.

B. F. WEBBER,
Judge of District Court, Ninth Judicial District,
Acting for Judge of Sixteenth Judicial District.

183 *Memorandum.*

I have carefully examined all the points raised in the able and exhaustive briefs of counsel, but I find it necessary to decide but one.

The land in question was withdrawn from settlement and entry by executive withdrawal, on the 25th day of May, 1869, by reason of the filing by the railroad company of the map of its line of route in the General Land Office, and said land was never restored to the public domain for the purpose of settlement and entry, but was held under withdrawal on account of the claim of the railroad company and the claim of John Ireland.

The railroad company filed with the proper officers its selection of and claim to said land and other land as indemnity land to compensate for deficiencies claimed to exist in lands withdrawn in the original tracts along its main line; and, thereafter, in August, 1891, the railroad company withdrew the specification of losses made in connection with its selection of 1885, and, in lieu thereof, substituted a specification of lands on the grant of the Saint Vincent Extension railway.

The claim of the railroad company was decided adversely to the company and its list of lands cancelled by Commissioner's letter under date of October 23rd, 1896, and, by the same letter, the land in question was reserved from settlement and disposal till the claim of John Ireland should be adjudicated.

On the 8th day of February, 1896, John Ireland made ap-
184 plication to purchase the land in question with other lands under the provisions of the act of Congress entitled "An act

to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887. He was allowed to make proof of his alleged right of purchase by Commissioner's letter, dated October 24th, 1896, of which allowance of proof defendant had due notice. After such proof and hearing, on appeal, the Commissioner of the General Land Office, on the 3rd day of February, 1898, decided that said Ireland was entitled to purchase said land under section 5 of said act, which decision was thereafter on the 20th day of January, 1899, duly affirmed by the Secretary of the Interior. Thereafter said Ireland, in pursuance of said decision, purchased the land in question at the price of $1.25 per acre, and, on the 21st day of December, 1899, a patent was duly issued to said Ireland for said land.

On the 15th day of April, 1891, the said lands were unoccupied, but during that month the defendant, a duly qualified homesteader, entered upon, took possession of, and made settlement and improvements upon the land in question, and has ever since maintained said possession and use of said land, and prior to November 27th, 1895, made improvements thereon of the value of $1,200. On the 27th day of November, 1895, the defendant, being still a duly
185 qualified homesteader, presented to and filed with the register and receiver of the local land office at St. Cloud (in which land district said land is located) proper papers for the purpose of filing on said land as a homestead, and tendered the legal fees. The register and receiver received and filed the papers and accepted the fees, but, on or about the 2d day of December, 1895, said register and receiver returned said papers and fees to the defendant and rejected said homestead application for the reason that the land in question was within the twenty-mile indemnity limit of the St Paul, M. & M. main line grant and was selected by said company April 22d, 1885.

I have recited in the memorandum only an abbreviated statement of a few of the facts set forth in the stipulation on which the case was submitted, but all that seem to me necessary in explanation of the decision that I have made.

At the times the defendant made his settlement and improvements upon the land in question and at the time he made his homestead application therefor, it was reserved from settlement and entry by executive order. If it be true that neither the railroad company nor Ireland had any right or interest in the land at the times of the making of the settlement, improvements and homestead application, in my opinion, that does not affect the rights of the defendant. The Land Department of the United States has the right, and ever since its establishment has exercised the right, to reserve
186 public lands from sale, settlement and entry during the pendency of any disputed or conflicting claims thereto.

Wolcott *vs.* Des Moines Na. & R. R. Co., 5 Wall., 681, 689;
Riley *vs.* Wells, 76 U. S., 648;
Wesley *vs.* Chapman, 11 Otto, 755;
Weaver *vs.* Fairchild, 50 Cal., 360.

A person entering upon public land and making improvements thereon or offering to enter the same at the local land office during the time that such land is reserved from settlement and entry, gains no rights thereby. Secretary Chandler says: "Those cases, as well as others, hold that a person who wrongfully enters upon unsurveyed or reserved lands, gains nothing by his residence and improvements thereon; he cannot initiate a claim in that way. This rule is eminently wise and just, and should be enforced in every proper case."

Peterson *vs.* Kitchen, 2 Copp's Land-Owner (Mar. 1876) 181;
Por[illegible] *vs.* Johnson, 3 Copp's Land-Owner 37;
Dietrick *vs.* Bissey, 3 Copp's Land-Owner (June 1876) 37;
Timmons *vs.* Oleason, 3 Copp's Land-Owner (Aug. 1876) 71;
McKee *vs.* Walther, 5 Copp's Land-Owner (Sept. 1878) 84.

187 This rule seems to me to be an absolute necessity, not only when such a person makes a claim against the Government, but in all cases. If a trespasser wrongfully enter*ing* upon Government land while the same is reserved from settlement and entry and gain anything by such trespass, he would have an advantage over a law-abiding citizen desiring to pre-empt or take such land as a homestead, but deterred from making settlement or entry thereon by order of the Land Department reserving such land from settlement or entry. This rule, as announced by Secretary Chandler, seems to me to be abundantly sustained by the decisions of the State and Federal courts.

Sage *vs.* Swenson, 64 Minn. 517;
St. Paul & Sioux City R. Co. *vs.* Ward, 47 Minn. 40;
Bellows *vs.* Todd, 34 Iowa, 18;
Spencer *vs.* McDougal, 159 U. S. 62;
Hamblin *vs.* Western Land Co., 147 U. S. 531;
Bullard *vs.* Des Moines R. R. Co., 122 U. S. 167.

I have carefully examined all the accessible authorities cited by the defendant, and, in my opinion, none of them conflict with the above named rule of authorities.

The Commissioner of the General Land Office has decided that John Ireland had a right to purchase the land in question under and by virtue of section 5 of the act of March 3, 1887, and this decision has been affirmed by the Secretary of the Interior, and Ireland has so purchased and received his patent for said land.

188 In my opinion, said decision is erroneous. The defendant, however, has no right, claim or interest in the land in question, and no connection therewith except as a wrongful trespasser thereon, and, as Ireland has received the patent for the land, the defendant cannot complain.

Minnesota Land Investment Co. *vs.* Davis, 40 Minn., 455.

I regret that the defendant must lose the valuable improvements that he has made upon the land, but I can see no remedy.

B. F. WEBBER, *Judge.*

Order Settling Case Containing Exceptions.

I hereby certify that the foregoing case containing exceptions hereto annexed, is a full and true statement of all the evidence introduced or offered, as the same appeared in the stipulation of facts herein and all the proceedings had upon the trial of the action therein entitled, including the findings and decision of the court therein, and, counsel for the respective parties having agreed upon the same and having been by me examined and found conformable to the truth, it is hereby settled and allowed and ordered to
189 be filed in said action as the settled case containing all the evidence and exceptions therein.

Dated this 12th day of June, 1901.

B. F. WEBBER, *Judge.*

(Title.)

Judgment.

This action came on for trial by the stipulation of the parties, at the city of Minneapolis, on the 25th day of March, 1901, before Hon. B. F. Webber, judge of the ninth district, sitting for the judge of the sixteenth district, and was by said judge heard and determined, and the said Judge Webber, having made his findings of fact and conclusions of law herein, by which judgment was directed to be entered for plaintiff as prayed in the complaint,

Now, therefore, on motion of E. T. Young, one of the attorneys for said plaintiff, it is hereby considered, adjudged and determined that said plaintiff is the absolute owner and is entitled to the immediate possession of the southwest quarter of section nine (9) in township 125, of range 45, in said county, and said defendant has no title, right or interest in said tract, or any part thereof, and that execution should issue from this court on demand of plaintiff to restore said land to his possession.

It is further adjudged, that plaintiff recover of defendant
190 his costs in this action, taxed at $10.00, and the clerk's fees at $3.90, in all amounting to the sum of $13.90.

Dated July 2, 1901.

By the court.

H. G. MARSHALL,
Clerk District Court.

(Title.)

Notice of Appeal.

You will please take notice that the above named defendant, Jacob Gertgens, appeals to the supreme court of the State of Minnesota,

from the judgment against said defendant of this court, in this action, entered on the 2nd day of July, 1901.

Dated July 16, 1901.

F. W. MURPHY,
Attorney for Defendant.
THOMAS KNEELAND AND
STOCKSLAGER & HEARD,
Of Counsel.

To E. T. Young, Esq., and Stevens, O'Brien, Cole & Albrecht, attorneys for plaintiff, and H. G. Marshall, clerk of district court.

Duly served July 17, 1901.
Bond.

191 12757.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1901.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } No. 124. Syllabus.

1. The Secretary of the Interior possesses full power to withdraw public lands from settlement and market at will, and when he acts in this respect it is deemed an act of the President. It seems to be quite immaterial what may be the basis of the order of withdrawal, or what public land it affects.
2. By the congressional land grant act of March 3d, 1865 (13 Stats. 526) it was made the duty of the Secretary of the Interior—section 7—to withdraw lands in aid of the grant therein provided for. Subsequently, by section 5 of the act of Congress of September 29th 1890 (26 Stats. 496), section 7 was repealed. Held, that this repeal did not revoke or annul an executive order, previously made, whereby certain lands had been withdrawn from the public domain for the benefit of the grant.
3. By the 5th section of an act of March 3d, 1887 (25 Stats. 556) it was provided that when railroad companies had sold lands,
192 as parts of their grants, co-termin-us with their constructed lines of road, to citizens, or to persons who had declared their intention to become citizens, but for some reason these lands were excepted from the operation of the grants and could not be conveyed to the companies, these citizens, or persons, if "*bona fide* purchasers" should have the right to buy of the Government and should thereupon be entitled to patents. Held, that this section must be construed liberally with a design to effectuate its object, and that citizenship, or declaration of intention to become a citizen, and a *bona fide* purchase are the essentials required by its terms. Held further, that

the right of one who purchased land from a railroad company, prior to the passage of the act of March 3d 1887, to perfect title under section 5 of that act, is superior to the settlement right of another person acquired after the passage of said act.

4. Where there has been a long and uniform course in construing a statute in a tribunal charged with the duty of executing it, such construction is always entitled to the most respectful consideration by the courts and ought not to be overruled without cogent reasons.

5. The expression "*bona fide* purchaser" is often times used ambiguously and is construed in various ways. The context must be examined and the expression considered with reference to its use and the connection in which it is found. It may mean without fraud or deception; it may mean without
193 notice of other's rights; it sometimes signifies honesty of purpose as distinguished from bad faith. To be a *bona fide* purchaser may, under some circumstances, require the payment of the consideration, or purchase price, but not always. In the statute in question the term "*bona fide*" was used as the opposite of "*mala fide*." Held, in the case at bar, following the rulings of the appropriate officers of the Land Department, that the plaintiff's grantor, to whom the patent was issued, was a *bona fide* purchaser of the land in dispute within the meaning of said section 5.

6. It is well settled that authority to hear and determine all questions of fact arising in the Land Department of the General Government is exclusively vested in the appropriate officers of that department. The jurisdiction thus conferred is judicial in its nature and the decisions of the department officers, when acting within their jurisdiction, are final and conclusive, in the absence of fraud, or imposition, or mistake.

7. The same rule applies where the question presented to the department officials is one of mixed law and fact. Their decision is equally as conclusive as to the fact involved.

Order affirmed.

194 12757.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1901.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } No. 124. Opinion.

This is an action in ejectment to recover possession, under a claim of ownership, of 160 acres of land in Traverse county,—the complaint being in the ordinary form. The answer admitted that plaintiff had paper title derived from the grantee named in the U. S. pat-

ent, but, in the form of a cross-bill, set up equitable matter upon which defendant claims he should have received a patent from the Government, and demands that the title be decreed to be held in trust for his use and benefit, and that plaintiff be required to convey the land to him.

The tract involved was originally included within the indemnity limits of the grant of lands in aid of the main line of the St. Paul, M. & M. R'y, of March 3, 1857 (11 Stats. 195) and March 3, 1865, (13 Stats. 526). Soon after the filing of the company's map of definite location,—by Commissioner's letter dated May 25, 1869, received at the local land office June 3, 1869,—the lands within
195 said indemnity limits, including this tract, were duly withdrawn from settlement and market, for the benefit of the grant.

April 22, 1885, all the lands within said indemnity limits were selected by the company, on account of asserted losses along its main line; and thereafter, in August 1891, the selection list was amended, by consent of the land officers, by a withdrawal of the specification of losses as first filed, and substituting therefor a specification of losses arising in the grant for the "St. Vincent extension" of said railway.

By act of Congress approved September 29, 1890, (26 Stat. L. 496) section 7 of the act of March 3, 1865, making it the duty of the Secretary of the Interior to withdraw the lands from market was repealed.

May 22, 1891, the Secretary gave direction to the Commissioner of the General Land Office that, after due notice, all lands theretofore withdrawn for indemnity purposes under the land grants in question, should be restored to the public domain for settlement and entry, but, of itself, this direction did not affect the previous order of withdrawal. Counsel for defendant are in error when asserting that the Secretary's action revoked the order. On May 28, of the same year, the Commissioner directed the register and receiver of the St. Cloud district, in which this land was situated, to restore to the public domain and open to settlement and entry all lands in the district theretofore withdrawn, situated within the indemnity limits
196 of the grant "not embraced in the selections heretofore made or applied for by said railroad company." This order, as will be seen, expressly reserved from its operation all lands which had been selected or applied for by the company, and among them was this particular tract of land. It expressly directed that there be open to settlement and entry all indemnity lands *not* selected or applied for, but in no manner did it revoke the previous order of withdrawal, in so far as that order and the subsequent selection affected and withdrew from the public domain the 160 acres in dispute.

March 21, 1894, the Secretary issued an order to the Commissioner wherein he considered said last mentioned selection, and after holding that the company had attempted to make selections for losses on its main line to the amount of 200,000 acres in excess thereof,

directed that action be suspended in respect to selections on account of the St. Vincent extension until further advices from his department. This order of suspension was revoked October 1, 1895, with directions to the Commissioner to adjust the grants.

January 1, 1896, the Commissioner ordered the company to show cause why the suspension upon indemnity selections made by the St. Vincent extension, should not be revoked, "and the applications of settlers to make homestead entries for said lands be taken up and considered in connection with the selections."

July 17, of the same year, the Commissioner rendered a
197 decision relative to indemnity selections as to lands in the St. Cloud district and held the same for cancellation, subject to appeal.

October 23, 1896, no appeal having been taken by the company, the Commissioner rendered a decision finally cancelling all indemnity selections in the St. Cloud land district, but in this order, as well as in the decision of July 17, was this significant paragraph: "A large portion of these lands have been applied for by parties claiming them under the settlement laws, and also by John Ireland, who claims under the act of March 3, 1887, (25 Stat. 556) as a purchaser from the St. P. M. & M. R'y Co. No disposal will be made of these lands until the above claims are adjudicated by this office. So advise the parties in interest."

From this it will be noticed that the order whereby indemnity lands were restored to the public domain expressly excluded from its operation certain tracts which had previously been applied for and that its effect was to restore a part, only, of the lands which had previously been withdrawn from public entry. As to the remainder there was no revocation of the withdrawal order, and among these was the particular tract in controversy.

As to it the original order of withdrawal remained in full force, because at that time the tract was claimed by two parties; one, the Rt. Rev. John Ireland, who asserted a claim and right under the act of Congress of March 3, 1887, as a *bona fide* purchaser from the railroad company; the other, this defendant, who based his claim
198 upon the following facts:

Prior to April 1891, the 160 acres was unoccupied, but during said month defendant, being in all respects duly qualified as a homestead claimant under the laws of the United States, entered upon and took possession of the same, has ever since continued and still does continue in such possession, claiming to occupy said tract as a homestead under the laws of the United States in good faith and believing that no valid railroad claim existed when he took possession and that the tract was or soon would be restored to homestead entry.

He has made valuable improvements, including the building of a house and the cultivation of a large portion of the land.

November 27, 1895, he presented to and filed with the register and receiver a homestead application for said tract of land accompanied by the proper, legal and sufficient in form, homestead affidavit, to-

gether with a tender of lawful fees and commissions, performing every act required of a homestead applicant.

December 2, 1895, said register and receiver rejected his homestead application on the ground that the land was within the twenty mile indemnity limits of the railway company's main line grant and was selected by it April 22, 1885.

In due time defendant appealed from said rejection to the
199 Commissioner. February 3, 1898, the latter rendered a decision sustaining the action of the register and receiver and on appeal, February 20, 1899, the Secretary filed his decision sustaining that of the Commissioner. April 24, 1899, the Secretary denied a motion filed by defendants' attorneys for a review of his decision. The officials of the Land Department without exception expressly refused to recognize the defendant's claims.

February 8, 1896, John Ireland, before mentioned, being a citizen of the United States and resident of the city of St. Paul, in the State of Minnesota, over the age of 21 years, made application to the St. Cloud land office for leave to purchase from the Government this and other tracts of indemnity lands under the provisions of the fifth section of the act of Congress before mentioned.

This application was considered by the department and reference was made thereto in a number of communications to the local land office. A final hearing thereon was afterward ordered, the controversy being between the applicant Ireland and certain settlers, among them this defendant, who had protested and who contended that Ireland had no right to purchase any of the land under the congressional act. On the order of the land commissioner evidence was taken, both Ireland and the defendant appearing and taking part therein; most of the facts being stipulated. The proofs being submitted, the register and receiver at St. Cloud rendered their decision March 16, 1897, holding that Ireland was qualified
200 and entitled to purchase under the act and rejecting defendant's application under the homestead law.

An appeal was taken to the Commissioner and his decision of date February 3, 1898, sustained that of the local officers. On appeal to the Secretary of the Interior his decision, rendered January 20, 1899, upheld that of the Commissioner. A motion to review this decision was overruled by the Secretary in April following.

After this, in obedience to instructions the register and receiver permitted Ireland to enter and pay for the land in controversy, and other tracts, and patents were thereafter duly issued to him.

The plaintiff, through a contract of date March 3, 1898, and a subsequent conveyance, has succeeded to Ireland's title and interest in this particular tract, but with full notice and knowledge of defendant's claims and rights. The latter insists that Ireland was not a *bona fide* purchaser of the 160 acres, within the meaning of the fifth section of the act of March 3, 1887; that the officials of the Land Department misunderstood that section, erred in their construction of the law, misapplied the same to the facts, and for these

reasons he demands that the plaintiff be declared trustee of the naked legal title, for his own use and benefit.

At the trial the court below made findings of fact and ordered judgment in favor of plaintiff for immediate possession of the entire tract and for his costs and disbursements.

A case was settled, embracing the evidence, and this ap-
201 peal is from the judgment thereafter entered. Ireland's right to purchase the land was based upon two written agreements entered into between him and the railroad company, one dated July 17, 1880, and the other March 30, 1883.

The first gave to him "until the 31st day of December, 1881, the sole and exclusive right and authority to place settlers upon, and of making sales or agreements of sales to parties desiring to settle upon or to purchase the same of all these tracts and parcels of land situated in the counties of Big Stone and Traverse, in the State of Minnesota," described in attached schedule as having been selected by said company, under its grant, as indemnity lands.

An additional list of lands was afterwards included in this schedule. Subsequent to the execution of this contract and prior to March 30, 1883, Ireland, acting under it, sold to and located a number of settlers upon some of the scheduled lands, giving to each a receipt for money paid and an obligation to convey the land as soon as the railroad company perfected its title, or, if the land should revert to the Government, an agreement to return the money, which, in each instance, was one tenth part of the agreed purchase price, and, in some cases, a year's interest in addition.

The second contract, of March 30, 1883, recited the fact of the execution of the first, that it had expired on the 31st of December, 1881, and that the railroad company had not yet a title to the lands therein scheduled. It was then stipulated that when the title
202 to the lands covered by this second contract, a part only of those embraced in the first, should be perfected in the company and notice thereof given to Ireland, he should have the privilege and right, for the term of 60 days thereafter, to purchase for himself, or for such parties as he might designate, subject to rights acquired by settlers prior to the date of the first contract, lands not to exceed fifty thousand acres in amount at the uniform price of $4. per acre.

There were provisions in respect to payment of the purchase price, the rate of interest and the enforcement of the contract, which are not here material, being mere details.

Under his first contract with the railroad company, Ireland expended large sums of money and devoted a great deal of time to a colonization enterprise and the expenditure and labor was kept up until 1883, large numbers of people being thereby induced to settle in a new country tributary to the line of road belonging to the company.

By it the company constituted Ireland its mere agent to make sales of the lands therein scheduled, to receive payment thereon and

to bind it to convey when its title should be perfected or to return the money paid, in case it failed to obtain title.

The agreement of March 30 was wholly different. The agency was at an end. Ireland was given the right to purchase for himself and for others, 50,000 acres at a stipulated price per acre and
203 upon certain terms. The company could not then convey, when it could was uncertain and it was agreed that purchasers should not be obliged to pay any part of the purchase price until it was within the power of the company to give good title. This was the construction placed upon the contract by the parties thereto and it was the rational and proper one. Ireland proceeded under this contract, as he had under the first, to secure purchasers for these lands. They became actual residents and received contracts for conveyances. He expended much time and large sums of money in the scheme to populate the country in question and his success was very noticeable. All this appeared at the trial and while we are of the opinion that his good faith was not then or there an open question, for reasons hereinafter stated, the proof tended to establish the fact as it undoubtedly had when the question of his *bona fides* was before the officers of the Land Department.

By the act of Congress it was provided that when railroad companies had sold lands as parts of their grants coterminous to their lines of road, to citizens or to persons who had declared their intention to become citizens, but for some reason these lands were excepted from the grants and could not be conveyed to the companies, these citizens or persons, if *bona fide* purchasers, should have the right to buy of the General Government and should thereupon become entitled to patents. It gave paramount rights to the purchasers if their good faith was established, conferring upon
204 such as could show their qualifications a positive right, which could not be curtailed or defeated by any act of the officials of the Land Department, to enter, purchase and pay for certain lands which were then beyond the reach of the ordinary settler, because withdrawn from settlement. Nor were there any settlers on the lands at that time, so that the power of Congress to deal with the same was unrestricted. And this law was in force when defendant first made settlement. It was under it that the Government finally awarded and issued the patent for the quarter section. Counsel really concede that if, as a matter of law, Ireland could not acquire title thereunder he cannot prevail in this action; that his right to recover depends upon the strength of his own title, and if he has none it is immaterial to him what claim the defendant in actual possession has or can assert.

We are of the opinion that there are two or three well settled rules of law relative to the conveyance of land by the Government which control and are conclusive of the plaintiff's rights in this action of ejectment.

1. By executive order of June 3, 1869, this tract of land was withdrawn from settlement and it has never been unqualifiedly restored to the public domain. This is evident from the various orders

issued by the Secretary of the Interior and the land commissioner for in each the rights of persons entitled to consideration, either as settlers under the homestead act or purchasers under the 1887 statute, were expressly reserved to them. Lands were excepted
205 from the operation of those orders, from those directing a revocation and restoration and from that of the land commissioner of date October 23, 1896, which seems to have been the final one. As to the selected lands, the final order was express and explicit. It was recited therein that a large portion of the withdrawn and selected lands had been applied for by persons claiming under the settlement laws and also by Ireland claiming under the act of 1887 as a purchaser from the railway company and the recital was followed by this unmistakable language: "No disposal will be made of these lands until the above claims are adjudicated by this office. So advise the parties in interest." There was no restoration of the land in controversy by this order. It was expressly excepted and reserved for an adjudication of the conflicting claims asserted by Ireland and defendant. The settled law in the Federal courts is that so long as an executive withdrawal of public lands continues in force the lands covered thereby are not subject to entry and no lawful settlement on them can be acquired.

Wolsey *v.* Chapman, 101 U. S. 768;
Bohal *v.* Dilla, 114 U. S. 49;
Bullard *v.* Des Moines R. R. Co., 122 U. S. 167;
Spencer *v.* McDougal, 159 U. S. 60;
N. P. R'y Co. *v.* Smith, 171 U. S. 260.

This was taken as the settled rule in
Sage *v.* Swensen, 64 Minn. 517.

We cite these cases and
Hamblin *v.* Western Co., 147 U. S. 531,
206 on the point, that although plaintiff must recover upon the strength of his own title the defendant under the authorities is not in a position to question the conveyance of the legal title by the Government by its patent. See to the same effect,

Minnesota Land Co. *v.* Davis, 40 Minn. 455;
Land Co. *v.* Ebilcisor, 52 *id.* 313;
Lamprey *v.* Mead, 54 *id.* 300.

An act of Congress of 1890, 26 Stats. 496, repealed, as before stated, section 7 of the original grant by which section it was made the duty of the Secretary to withdraw the lands and co-nsel argue that this was a revocation of the executive order, restoring of itself these lands to the public domain. But aside from the fact that if Ireland's rights accrued at all, they were then irrevocably fastened upon the lands, it is plain that this repeal did not annul or revoke the withdrawal order, nor did it pretend or purport to annul or affect it. The validity of that order did not depend upon section 7, but was valid without and independent of that enactment. The Interior

Department possesses plenary power to withdraw public lands from settlement and market at will, and when it acts in this regard it is deemed an act of the President.

Wolsey *v.* Chapman, 101 U. S. 755,

and it seems to be quite immaterial what may be the reason or basis of the order, or what land it affects. A withdrawal as part of a land grant, of lands outside and far beyond the limits of the grant was held effectual and valid in

207 Wolcott *v.* Des Moines, 72 U. S. 681.

Again in

Spencer *v.* McDougal, 159 U. S., 61,

it was held that although more land is withdrawn by an executive order than is necessary for the railway grant, which it refers to and is based upon, the withdrawal is valid, even to the extent of defeating the claim of a subsequent pre-emptor. The withdrawal of lands from the public domain where no antecedent rights under the settlement laws and the subsequent restoration thereof, is, and of necessity must be, committed to the discretion of the officials of the Interior Department. And it has been the uniform ruling of that department when construing the law now before us that: "The right of one who purchased land from a railway company, prior to the passage of the act of March 3rd, 1887, to perfect title under section 5 of that act, is superior to the settlement right of another acquired after the passage of said act."

22 L. D., 32.

Under the authorities before cited it might safely be held that as defendant could not acquire and did not have any interest in this land, the facts which he alleged in his answer and established on the trial are of no avail to him, because the patent, not void, but at most simply voidable, has been issued to Ireland by the U. S., and the latter alone can question its validity. But plaintiff's right to recover is not dependent exclusively upon this rule of law, in our opinion.

208 2. The next question for discussion is whether Ireland was a *bona fide* purchaser of the land within the intent and meaning of the fifth section of the act of 1887. It must not be forgotten that this provision of the law was not passed for the purpose of aiding or relieving persons who subsequently entered into contracts with railroad companies, but was solely for the benefit of those who had in good faith purchased prior to the enactment, and who might be grievously wronged if no relief was afforded them. No contract entered into after the passage of the law was to be affected by it. All within its scope were past transactions, in which there had been purchases in an honest belief that title would be perfected in the future by means of existing land grants. Ireland's 1883 agreement was entered into four years prior to the passage of this law, which had for its object a remedy for good faith purchasers where, for some reason, the railway companies with which they had dealt, failed to

obtain title and the equities of the purchasers were so great as to call for legislative interposition.

It was therefore proper for the officers of the Land Department to construe § 5 liberally, with a design to effectuate its object. A strict construction would destroy the intent and contravene its purpose, adding to, instead of diminishing, the injury inflicted by rulings adverse to the companies as to land grants. The department officials so held following the universal practice in all cases where construing remedial statutes, and gave to section 5 a liberal con-

209 struction, that its real object might be subserved and promoted. The extent to which the department has gone to sustain claims asserted under this statute, will be seen upon examination of many cases which have been decided. In that of S. L. Campbell, 12 L. D., 247, the contract under consideration, made between Campbell and the railway company, contained full information as to the status of the land and of the doubt as to an acquiring of the title by the railway company. The latter merely agreed that if it obtained title it would sell to Campbell for a certain price, giving its present consent that he might settle upon the land. He was to pay no part of the agreed price until the company could convey a good title, nor was he bound to accept a deed. As to him the contract was nothing but a permit to occupy and an option to buy. They only real distinction between that case and the one at bar is that Campbell personally entered upon the land covered by the agreement, occupied the same and made valuable improvements.

From the decision it is evident that the occupation and improvements were merely regarded as evidence of Campbell's *bona fides*. They tended to establish his good faith, and were not considered as of any greater evidentiary value, for the statute nowhere requires occupation or improvements by the purchaser. Citizenship or a declaration of intention, and a *bona fide* purchase are the only essentials, so that occupation and improvements are of no consequence, except as they strongly establish honesty of purpose in the purchaser. The

210 railway company failed to secure title to the Campbell land and he was then allowed to purchase from the Government under § 5. Many other cases of like character might be referred to. One is the

Austin case, 21 L. D., 507.

Mrs. Austin was permitted to purchase under this law although she took possession of the land without an agreement in writing, and with a verbal understanding that the company could not then sell or agree to sell and could not take any money from her until it obtained title. It was held immaterial as to how the contract was evidenced and further that the terms "purchase" and "sale" as found in the law are not to be understood in their technical and limited signification, but rather in their widest and most comprehensive meaning. In

Grandin *v.* La Bar, 23 L. D., 301,

the Secretary said that the object of the law was to protect all per-

sons who had parted with a valuable consideration, whether in money or other property, in consideration of the transfer of lands for which a company could not and did not pass valid title. There the consideration paid was preferred stock in defendant company which, it was contended, had been issued without legal authority and had no market value. Upon this point the Secretary said: "It is charged that the stock had no market value, but the fact, if true, does not affect the question" of consideration.

211 In the present case Ireland had placed a large number of settlers on lands belonging to the company and made them patrons of its road, under his 1881 agreement, and he continued to do this under the agreement of 1883. A settlement of the country was for the benefit of the company in many ways and undoubtedly this fact entered into, and actually was part of the consideration for the agreement. The services rendered and the labor performed by him in inducing settlement of a new region was part of this consideration, and should he be denied the benefits of the act of 1887 these services and this labor would go wholly unrewarded, a most inequitable result. As showing the liberality with which § 5 has been construed by the courts, attention is called to U. S. *v.* R. R. Co., 88 Fed. Rep., 832, wherein it was held that where an applicant, under the act, possessing the requisite qualifications as to citizenship, and who was a *bona fide* purchaser from one who had bought from a company it was of no consequence that the original purchaser was not a citizen, and had not even declared his intention to become such.

In the exhaustive opinion of the land commissioner written in this case, which opinion was approved by the Secretary, the very liberal views previously adopted in construing the act were referred to and applied and it was said that the railroad company recognized Ireland's good faith in purchasing and so did the purchasers holding contracts with and under him, and this was evidence of the *bona fides* of his purchase.

212 It was held, that as Ireland had expended time and means in settling and selling the lands, he would suffer great loss should he fail to secure relief, and, as the whole scope of the law was remedial, it should be applied because he and persons dealing with him had acquired equities, which in justice ought to be recognized, and that it was the intention of Congress to afford relief even where the evidence showed no more than an agreement of purchase, by a *bona fide* purchaser, evidenced by such consideration as would show good faith.

The Commissioner also referred to the fact that defendant's homestead claim was based upon a settlement in 1891, years after Ireland's contract was made and after the passage of the act of 1887 and, as before stated, it was decided that the latter was a *bona fide* purchaser, within the spirit and intent of the law. The decision was in accordance with many previously made by the department in which this term "*bona fide* purchaser," as used in the statute, had been construed, and it was nothing but an application of the opinion

of the Attorney General, 6 L. D. 275, wherein he said: "The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers who through the erroneous or wrongful disposition of the lands in the grants, by the officers of the Government, or by the railroads, have lost their rights or acquired equities, which
213 in justice should be recognized." For years, this had been the rule in the department when construing this statute.

Where there "has been a long and uniform course of construction of a statute in a tribunal charged with the duty of executing it, such construction is always entitled to the most respectful consideration by the courts and ought not to be overruled without cogent reasons." This was said in

U. S. *v.* Moore, 95 U. S. 760,

and we quite agree. It is contended by counsel for defendant that as the 1883 agreement of the company was not one which could have been enforced by either party; it should not be recognized. But, in the opinion of the officers charged with interpreting the law, enforcibility of the contract is not the proper test. We are of the same opinion, for with such a test, strict construction of the law would be the rule, not the liberal construction which has always prevailed. The expression "*bona fide* purchaser" is oftentimes used ambiguously and it is construed in various ways. We look to the context, and consider the term with reference to its use and the connection in which it is found. It may mean without fraud or deception. It may mean without notice of another's rights. It sometimes signifies honesty of purpose as distinguished from bad faith.

To be a *bona fide* purchaser may, under some circumstances, require the payment of the consideration or purchase price, but not always. In

U. S. *v.* R'y Co., 165 U. S. 465,

214 when construing § 5 it was said: "Congress attempted to protect an honest transaction between a purchaser and a railway company, even in the absence of a certificate or patent." And further, that "the act must be held to include one who, if not in the fullest sense a '*bona fide* purchaser' has nevertheless purchased in good faith from the railroad company."

Again in another case in the same volume,

Winona Co. *v.* U. S. p. 483,

the court said: "It is essential to obtaining the protection of these statutes that the party purchasing from the railroad company has no notice by any fact subsequent to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the Land Department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the Government were waived."

Here it was held that a purchaser with notice could not claim to be one in good faith, and that really ought not to have been questioned. In this statute we apprehend the expression "*bona fide*" is used as the opposite of *mala fide*, and it is impossible to point out wherein Ireland acted in bad faith in the entire transaction
215 or wherein he failed to act in the best of faith and with intent to carry out and complete the purchase by paying the money. We are of the opinion that as a matter of fact he was a "*bona fide* purchaser" within the meaning of the law and this view must also lead to an affirmance of the judgment appealed from. But there is another, and principal, question in the case.

3. The Land Department determined that Ireland was a *bona fide* purchaser and if this question was one of fact, its determination is conclusive upon all courts. The question of good faith enters into the qualifications of all settlers under the homestead act as it formerly did into all cases arising under the repealed pre-emption law. This question has always been regarded by the department as one of fact purely, but even if we should concede that the question of good faith is one of mixed law and fact, the decision of the officials of the Land Department must be held equally as conclusive as to the fact involved. While it may be exceedingly difficult to draw the line and distinguish between pure questions of fact and those of mixed law and fact, the facts in either case are to be determined in the Land Department as questions of fact alone. The difficulty of distinguishing, to which we have referred, emphasizes the necessity of such a rule.

It is well settled that authority to hear and determine all questions of fact arising in the Land Department of the General
216 Government is exclusively vested in appropriate officers thereof. The jurisdiction thus conferred is judicial in its nature and the decisions of the department officers, when acting within their jurisdiction, are final and conclusive and cannot be reviewed by any other branch of the Government, when unaffected by fraud or mistake. This rule was first adopted in

Wilcox *v.* Jackson, 13 Pet. 511.

It has been followed repeatedly since that time.

Said Mr. Justice Miller, in

Moore *v.* Robbins, 96 U. S. 535,

"when land officers decide controverted questions of fact their decision is final in the absence of fraud or imposition or mistake except as they may be reversed on appeal in that department."

Under the rules of the department, 8 L. D. 29, and its decisions, an applicant under the fifth section of the law of 1887, is a special pre-emptioner, and therefore, to be treated the same as any other pre-emptioner, except that he must have the added qualification of being a "*bona fide*" purchaser from a railway company before the latter's claims or rights were cancelled.

Therefore all matters relating to the applicant's status as a purchaser in good faith from the company, as well as his citizenship, are

matters which constitute his qualifications or competency as such special pre-emptioner.

We have held that the competency of a party to comply
217 with the requirements of the pre-emption act—his qualification as a pre-emptioner is a question of fact—peculiarly for the determination of the officers of the Land Department and the decision of these officers is conclusive on a question of fact in the absence of fraud."

Bishop *v.* Hyde, 66 Minn. 24;

No valid distinction between a determination as to the competency or qualifications of the ordinary pre-emptor and the applicant Ireland can be suggested. That the latter possessed the requisite qualifications under the 1887 act was peculiarly for the determination of the officers of the Land Department and by such officers has been disposed of in his favor.

Whether a purchaser is a *bona fide* purchaser, is a question of fact.

Green *v.* Humford, 50 Pa. St. 215.

See also, as to the nature of the question of *bona fides* and the conclusiveness of a department decision.

Jeffords *v.* Hine, 11 Pac. Rep. 351;
Vance *v.* Burbank, 101 U. S. 519;
Quinby *v.* Conlan, 104 *id.* 420;
Carr *v.* Fife, 156 *id.* 494;
Cath. Bishop *v.* Gibbon, 158 *id.* 155.

As before stated, the question of Ireland's *bona fides* was one of fact, or, possibly a question of mixed law and fact. In either case the determination of the Land Department cannot be reviewed in this court. We are obliged under the decisions to abide by it.

Order affirmed.

COLLINS, *J.*

218 [Endorsed:] No. 12757 State of Minnesota, supreme court. John P. O'Connor respondent *vs.* Jacob Gertgens appellant. Opinion and syllabus Filed April 4 1902. D. F. Reese clerk. October term, A. D. 1901 Collins J.

219 *Copy of Appellant's Petition for Rehearing.*

STATE OF MINNESOTA:

Supreme Court.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant.

Appellant herein respectfully petitions and moves said court for rehearing of the above entitled cause.

The importance of the cause and the brief time allotted counsel upon the oral argument; the many exhibits required to be exam-

ined, and the new and complicated questions of law involved because especially the matters therein involved are peculiarly of Federal cognizance, and the facts that this court is so overburdened with work as to make it practically impossible for its members to make any exhaustive examination of either the facts or the law in any particular case, and that by reason thereof the court has in this case, as we believe, been led into misapprehensions of the facts, and consequently a misconception of the law as applied thereto; and that since the former argument, decisions have been rendered by the Supreme Court of the United States touching the foundation of the decision rendered herein,—all make it not only proper but almost imperative that a re-argument be had in order that justice may be done to the parties in the cause, and that a wrong precedent be not established in this court.

220

We therefore move for a re-argument upon the following grounds;

I.

In the first paragraph of the syllabus it is held:

"1. The Secretary of the Interior possesses full power to withdraw public lands from settlement and market at will, and when he acts in this respect it is deemed an act of the President. It seems to be quite immaterial what may be the basis of the order of withdrawal or what public lands it affects."

The whole foundation of this holding has been swept away by the recent decision of the Supreme Court of the United States in the case of So. Pac. R. R. Co. *vs.* Bell, filed Jan. 13, 1902, since the oral argument herein, and reported in 22 Sup. Ct. Rep. 232. By section 3 of the granting act under consideration in that case, after granting the place lands it was provided that in case of any deficiencies therein "other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, etc.," being substantially the same as the granting act in the case at bar.

221

By section 6 of said granting act it was provided, among other things, that the sections of land "hereby granted" should not be liable to sale or entry or pre-emption. The court held that the words "hereby granted" referred only to place lands and that therefore the act did not expressly direct a withdrawal of the indemnity lands. But immediately after the filing and approval of the plat the Secretary of the Interior withdrew from sale and homestead entry the indemnity lands which thereafter remained so withdrawn. Thereafter the railroad company selected the indemnity quarter section of land in controversy in lieu of the quarter section lost in its place limits. The land so selected was at the time of the granting act vacant and unappropriated public land of the United States. "The company had not at the time the selection was made, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the grant and the provisions of the granting act." Intervening the passage of the granting act and the selection by the railway company of the indemnity land the

defendant settled on said land and a patent was thereafter issued to him by the United States, under the homestead laws. The question before the court was whether the executive order of withdrawal had the effect of withdrawing the lands from entry so that the rights of homestead settlers could not thereafter attach thereto and upon an exhaustive review of the authorities including the land decisions, the court held that *id* did not and was wholly ineffectual and invalid for any purpose.

222 Among other things in its opinion it said: "The conclusions to be deduced from these cases are * * *

"(2.) That to lands within the indemnity limits, the company *takes no title until a deficiency in the place limits has been ascertained* and the company has exercised its right of selection with perhaps some rare exceptions. See St. P. & P. R'y *vs.* No. P. R. R. Co., 139 U. S. 1."

The case last above cited as an exception involved a controversy between two railway companies, wherein it was held that as between them a selection is unnecessary where there are great deficiencies in the place limits and as explained So. Pac. R'y Co. *vs.* Bell, 124 Cal. 475, had no application to the controversy between a railroad company and entryman.

It has been further held in both this and the United States Supreme Court, that "no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and a selection made *approved by the Secretary of the Interior.*"

State *vs.* Sage, 75 Minn. 448–454.
Sioux City and St. P. R. Co. *vs.* C. M. & St. P. R'y Co., 117 U. S. 406.

And that "until the selections were approved there were no selections in fact."

Wisc. Cen. R'y Co. *vs.* Price, 133 U. S. 496, 512.
So. P. R'y Co., 28 L. D. 281.
Ks. P. R. Co. *vs.* Atchison R. R. Co., 112 U. S. 414, 421.
Resser *vs.* Carney, 52 Minn. 397.
Musser *vs.* McRae, 38 Minn. 409.

223 In United States *vs.* R'y Co., 141 U. S. 358, 374–376, the syllabus reads:

"The principle re-affirmed that title to indemnity lands does not vest in the railway company for the benefit of which they are contingently granted, but remains in the United States until they are actually selected and set apart under the direction of the Secretary of the Interior, specifically for indemnity purposes."

In its opinion on page 376, the court says: "In respect therefore of even numbered sections within the indemnity limits of the Leavenworth road pre-emption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri-Kansas Company, and rights thus attaching would not be displaced by subsequent selection and by issuing patents to the railroad company."

The case of Sage *vs.* Swenson, 64 Minn. 516, was overruled on this point by the case of State *vs.* Sage, 75 Minn. 454.

Now, as to the application of the law of the above decisions to the facts in the case at bar. Section 7 of the granting act directed the withdrawal of the lands, and pursuant thereto an executive order of withdrawal was made in 1869. Said section 7 was repealed by section 4 of the act of Congress passed Sept. 29, 1890. Whether or not said repealing act in and of itself and without any executive action had the effect of revoking the withdrawal already made, there can be no doubt that it absolutely prevented any further withdrawal of the lands by merely executive action and forever deprived
224 the railway company from acquiring any right to the indemnity lands in question. The alleged selection of 1885 being made in bulk without specification of losses because there were no deficiencies in the place limits along the main line and 200,000 acres had already been selected in excess of the amount necessary to satisfy the grant (6 L. D. 77; Ex. D., page 154, P. B.), and the selection not having been approved by the Secretary, but on the contrary, withdrawn, rejected, and thereafter cancelled, it constituted no selection at all as stated in the above decisions and was wholly invalid for any purpose. It formed no obstacle to either the passage of the repealing act or to the revocation of the withdrawal or the settlement rights of defendant after such revocation.

May 22, 1891, the Secretary of the Interior issued his revoking order (Ex. B) in which he directed that "All lands under withdrawals heretofore made and held for indemnity purposes under the grants to said road be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases." The St. P. M. & M. R'y Co. had made no response to the previous order to show cause nor did it appeal from the revoking order. Whether or not such executive revocation was necessary in addition to the repealing act to forever foreclose the right of the railway company to the indemnity lands, it is clear that in such revoking order there was no exception of any lands on account of any selection theretofore made and that then, if not before, the lands ceased to be subject to the railway grant, and to all future rights of the railway company to acquire title
225 thereto. As to whether or not this order constituted a revocation of the withdrawal it would seem that as stated by the court is customary in other cases the construction placed thereon by the Secretary himself in his official capacity ought to have some, if not conclusive, weight with the court.

In St. P. M. & M. R'y Co. *vs.* Rowan, *et al.*, 22 L. D. 610, the Secretary having under consideration these very indemnity lands, held:

"It appears from your office decision that these lands are within the 20-mile, or indemnity limits, along the main line of said road and were included in list of selections filed April 22, 1885 (list No. 10), for which indemnity was designated in bulk. *The indemnity*

withdrawal made on account of the main line was revoked by departmental order of May 22, 1891 (12 L. D. 549)."

As to these same lands the Secretary, in O'Brien *vs.* Chamberlin, 29 L. D. 218, held:

"While it is true that this land was included within a legislative withdrawal at the time of the issue of the circular of Sept. 6, 1887, yet such withdrawal was subsequently *revoked by departmental order*, May 22, 1891 (12 L. D. 541), and by the terms of that order the lands were restored to settlement and entry in accordance with the rules heretofore established in similar cases."

The court seems to have entirely overlooked these decisions and to have assumed that the acting Commissioner, W. M. Stone, did and could by his letter of May 28, 1891 (Ex. C), prevent the previous order of the Secretary from having the effect of a
226 revocation of the withdrawal or that after such revocation the acting Commissioner could of his own power, and without act of Congress, again take the lands from the public domain and restore them to the indemnity grant. The court also assumes that the Secretary of the Interior by language at the close of the letter of final cancellation on Oct. 23, 1896 (Ex. I 1), did and could of his own power continue the withdrawal or restore the same to the indemnity grant.

We respectfully submit that within the principle of the decision of So. Pac. R'y Co. *vs.* Bell, 22 Sup. Ct. Rep. 232, *supra*, no such power was vested either in the Secretary or Commissioner after the congressional repeal of the original withdrawal act and the executive revocation of the Secretary of May 22, 1891. By such repealing act and order of revocation the withdrawal was killed, the lands had passed from the indemnity grant and become a part of the public domain, so that they could not by executive action, without act of Congress, be re-transferred to the indemnity grant. The title to the lands had always remained in the United States because there had been no railway selection which had been approved by the Secretary. The deficiencies in the place limits of the company having been filled, all the purposes for which the indemnity lands had been made subject to the selection by the company were fulfilled and the lands were no longer in any sense subject to acquirement by the railway company. To hold otherwise would be conceding to the executive officers of the Government the sovereign power of disposing of the lands of the United States without
227 even the consent of Congress. The proposition is so repugnant to reason and might lead to such injurious consequences that it should not be declared as law unless supported by the highest authority.

But assuming without conceding that the acting Commissioner by his letter of May 28, 1891, (Ex. C), did and could modify the previous order of the Secretary to the extent of holding that lands as to which selections were then pending were not then fully restored to homestead entry, but remained subject to such selections, still the order, if valid, could not and did not affect the rights of this

defendant. It was therein provided (151–2, P. B.) that applications to make entries upon lands covered by unapproved selections might be received, noted, and held subject to the claims of the company and if it should thereafter be shown and held that such claims were invalid the homestead entry would be allowed and the selections cancelled.

January 13, 1896, the railway company was directed to show cause why its indemnity selections for losses sustained along the main line of said road should not be cancelled. It is stipulated herein that on or prior to August 18, 1891, the railway company withdraw its selections of 1885, and as held by the land officials in subsequent order, abandoned the same, and in August, 1891, attempted to make a selection for losses along the St. Vincent branch under the act of 1871. The court inadvertently states that this new selection was an amendment of the former, whereas as held by the Land Department (Exhibits E and H 1), the St. Vincent
228 grant was entirely independent from the former, and for that reason the selections for losses along the St. Vincent branch were held for cancellation and finally cancelled, as being wholly invalid, and no bar to the disposition of lands to homestead entrymen made while such selection was pending.

St. P. M. & M R'y Co. *vs.* Rowan, 22 L. D. 610.

Within this decision and that of Ashelman *vs.* N. P. R. R. Co., 23 L. D. 213–14, the homestead entry of defendant should have been allowed when made in 1895, but which was on the contrary rejected as being in conflict with the selection of 1885 theretofore withdrawn and abandoned. (Ex. L, pages 172–173.) Upon such rejection and substantially as required by the letter of the acting Commissioner of May 28, 1891 (Ex. C, aforesaid), defendant appealed from such decision to the Commissioner of the General Land Office, who on Oct. 23, 1896, finally cancelled all the selections of said company (P. B., pages 100–1). In the order of Jan. 13, 1896, (Ex. F), the railway company was required to show cause why its selection "*should not be removed and the applications of settlers to make homestead entries for said lands be taken up and considered in connection with said selections.*" By making such order the Commissioner must have held that the withdrawal was already revoked and that the settlers on the lands were there rightfully and that their homestead applications were properly before the Land Department for consideration and that upon the cancellation of the railway claims their homestead entries would be allowed. Pursuant thereto the orders of July 17,
229 1896, and Oct. 23, 1896, were made cancelling all said railway claims and the only obstacle then standing in the way of the allowance of a homestead entry to defendant (which otherwise would have been done) was the fact that John Ireland had prior thereto and on Feb. 8th, 1896, made an application to purchase the land under the act of 1887. We are unadvised, but this court cannot mean to hold in its decision that the Commissioner by the words in said last named letter, "no disposal will be made of these

lands until the above claims are adjudicated by this office, so advise the parties in interest" either restored the lands to the indemnity withdrawal or continued the withdrawal, for this would be not only beyond the power of the Commissioner, as stated in the decisions, *supra*, but would be a most strained construction to put upon the language. Taking this language in connection with the language of the order to show cause (Ex. F, aforesaid), there is no other possible construction to be placed thereon than that it simply meant that during the pendency of the adjudication of these cases no disposal would be made but that upon such determination the one showing a superior right to the land would be vested with the same. There can be no doubt that if the land officials had upon such adjudication determined that Ireland was not a *bona fide* purchaser, the defendant would have been allowed a homestead entry on the land, as was held in the Rowan case, 22 L. D. 610, and Ashelman case, 23 L. D. 513. The whole proceedings of the Land Office upon the Ireland claim are in consonance with such views. In the order of January 20, 1897, the Commissioner required notice to be given to adverse
230 claimants "to appear and protest or *otherwise defend their claim thereto* against the application of said Ireland" (P. B. 101), and in the proceedings under said order the defendant's application and all his proof as to settlement were duly presented and in his protest the defendant asked that his homestead application might be allowed (P. B. 127–132). In the decision of the Commissioner thereon he held "these selections were pending before this office on Oct. 23, 1896, when they were cancelled *and the land restored to settlement and entry*, subject to such rights as might have been acquired under the act of March 3, 1887, *supra*," thereby in this very case substantially construing his own language in his letter of October 23, 1896, in consonance with our contention.

There can be no question, therefore, that on and after Oct. 23, 1896, the withdrawal was completely revoked and the lands restored to the public domain. The rights of Ireland were wholly dependent on that fact, which, indeed, it was necessary for him to prove in order to bring himself within the terms of the act of March 3, 1887. The patent was issued to him not in fulfillment of the railway grant but by virtue of its failure.

In reaching its conclusions the reasoning of the court and its citation of authorities were based wholly upon the theory of the continuance of the withdrawal until the issuance of such patent to Ireland, and that such patent was equivalent to the certification of the lands to the railway company under its grant. Hence the court reasoned that defendant was not in a position to attack Ire-
231 land's title. To this point the court cites the Ebilcisor case (52 Minn. 313), and the Davis case (40 Minn. 455), in both of which lands in place were involved and certified to the railway companies under their grants, and it was simply held that as to a person having no interest therein the certification was conclusive.

In Lamprey *vs.* Mead, 54 Minn. 300, also cited, the title had

passed to a patentee at the time of the granting act which by its terms excluded lands otherwise appropriated.

The other Federal cases cited by the court as to the powers of land officials to withdraw indemnity lands were unavailingly pressed by Mr. Justice Brewer upon the majority of the court in Hewitt *vs.* Schultz, 180 U. S. 139, which case was reviewed and followed by a unanimous court in Southern Pac. R. R. Co. *vs.* Bell, *supra.*

II.

The court having held that a homestead settlement after the passage of the act of March 3rd, 1887, does not come within the 2nd proviso thereof, further held that the option given by the railway company to Ireland brought him within the meaning of the terms "sold" and "*bona fide* purchaser," as used in said act.

The court must have inadvertently overlooked the decision of the United States Supreme Court in U. S. *vs.* Winona, etc., Co., 165 U. S. 463, which involved the construction of the same words in the 4th section of said act, with evidently the same meaning to be attached thereto. In its syllabus the court held that to bring one within
232 those terms he must "have purchased in good faith, *and paid value* for the lands;" and its opinion at page 480: "It does secure to every one who in good faith has made an *absolute* purchase from the railroad company," etc.

There must then be an *absolute* purchase and *payment of value.*

In the case at bar Ireland did neither. Giving to the terms of the act the most liberal construction and taking all his evidence together, both competent and incompetent, it does not constitute a purchase within the above decision. Neither party could enforce performance of the option agreement and nothing was done by either party to estop the other from denying its validity.

As we understand the Campbell and Luey decisions there was no option in either, but the contracts became absolute and binding upon both parties through possession and improvements. The Secretary so held in his decisions thereon. His final decision in the Campbell case appears in 12 L. D. 249, and reads:

"Entered into possession of same, placed buildings thereon and caused breaking to be done. The improvements made by him on the section are estimated to be worth $4,000. It clearly appears from the examination of his contract with the railway company that the same was a *bona fide* transaction wherein he agreed to pay for said lands at the rate of $7 per acre, he to receive a rebate of $3 per acre for each acre of the land he should cause to be cultivated within a certain time."

In the Luey case (21 L. D. 511) there was a lost letter from the railway company, the contents of which proven purported to
233 be an agreement to sell, but aside from that the Secretary held that an oral agreement with full payment of purchase money, improvements to the value of $3,000, and 20 years' continu-

ous possession made a binding contract so that "*the railroad company could be compelled to execute title*, if it had title."

In Grandin *vs.* La Bar, 23 L. D. 301, preferred stock of the Northern Pac. R'y Co., entitling the holder to exchange the same for lands of the company was given for the indemnity lands, and the Secretary held that the mere fact that the stock had no *market* value on the New York exchange was immaterial, inasmuch as it had intrinsic value, saying: "It was unquestionably valuable to any one who might desire to invest in western lands, and there were many persons at that time, etc."

From the facts and reasoning in these decisions it is clear that the Secretary held a binding contract necessary to bring one within the terms of the act, and we reproduce them here because it is evident that the court must have overlooked some of their salient features.

The court seems to have thought that defendant was questioning the *good faith* of Ireland, whereas in fact, the only point we intended to make was that Ireland was not a purchaser at all, that the land was not ever "sold" to him, and that his option agreement was and is a nude pact. That is still our contention. We know of no decision either in the courts or Land Department holding otherwise upon such evidence as was produced herein.

III.

234 But the court holds that as to whether he is such purchaser is a question of fact and not subject to review by the court.

We think the court must have overlooked the point that the evidence as to his purchase is undisputed. If there were conflicting evidence on the citizenship of Ireland, or as to whether he had any paper writing, the finding thereon would be conclusive. But where all the facts are admitted and the only question is whether taking all the facts together they make one a purchaser within the meaning and proper construction of the act of 1887, there is nothing presented, as it clearly seems to us, but a purely law question.

It is settled law that when the land officials err in construction of the law or in application of the law to the undisputed facts, their action is reviewable by the courts.

Johnson *vs.* Towsley, 13 Wall. 72, 85–6.
Sanford *vs.* Sanford, 139 U. S. 642.

An examination of the cases cited by the court herein will show no deviation therefrom. See excerpt taken by the court from Moore *vs.* Robbins, 96 U. S. 535, as to "controverted questions of fact," also the following excerpt from Baldwin *v.* Starks, 107 U. S. 463: "But they (the courts) are not authorized to re-examine into the mere question of fact, *dependent on conflicting evidence*, and to review the weight which those officers attached to such evidence."

"If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled

thereto, the party wronged can resort to a court of equity to
235 correct the mistake, and compel the transfer of the legal title to him as the true owner."

Lee *vs.* Johnson, 116 U. S. 48.

We invite an examination by the court of the facts and issues presented in Green *vs.* Humford, 50 Pa. St. 215, a brief excerpt from which is set out in this decision. We forbear here from commenting thereon. Inasmuch as the question here is not the good faith of Ireland but the construction of the law and applicability of the law to the undisputed facts the cases cited as to the conclusiveness of a finding of good faith would seem to have no bearing.

Respectfully submitted,

F. W. MURPHY,
Attorney for Appellant.

THOMAS KNEELAND,
L. C. SPOONER, AND
STOCKSLAGER & HEARD,
Of Counsel.

236 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1901.

WEDNESDAY MORNING, 9.30 O'CLOCK,
April 23rd, A. D. 1902.

Court convened pursuant to adjournment. All the justices being present.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } Cal. No. 124. Reg. No. 12757.

This cause came on to be heard this day upon the application for rehearing herein.

Thereupon the same was submitted to the court for decision upon papers filed. After due deliberation thereupon had,

It is ordered that the application for reargument herein be and the same is hereby denied and the stay vacated.

Ordered further, that the remittitur in this case be retained for 30 days to enable the appellant, if so advised, to sue out a writ of error.

A true record
Attest:

D. F. REESE, *Clerk.*

[Seal of the Supreme Court, State of Minnesota.]

The foregoing is a full and true copy of the minutes of argument and order in the above entitled cause.

Attest:

D. F. REESE, *Clerk.*

237 [Endorsed:] 12757 State of Minnesota supreme court. John P. O'Connor respondent *vs.* Jacob Gertgens appellant Copy of minutes of argument.

238 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1901.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } No. 124.

Pursuant to an order of court duly made and entered in this cause, on the 25th day of April A. D. 1902

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the district court of the sixteenth judicial district, sitting within and for the county of Traverse be and the same hereby is in all things affirmed

And it is further determined and adjudged that the respondent above named, do have and recover of said Jacob Gertgens appellant herein the sum and amount of seventy-three and $\frac{7}{100}$ dollars ($73.70) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 25th day of April A. D. 1902.

By the court.

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	
Printer's fees	37.20
Clerk's fees, supreme court	11.50
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$73.70

239 [Endorsed:] 12757 State of Minnesota, supreme court. Transcript of judgment. Filed April 25th A. D. 1902 D. F. Reese clerk.

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol, in the city of St. Paul, this twenty-fifth day of April A. D. 1902.

D. F. REESE, *Clerk.*

240 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1901.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } No. 124. Appeal from District Court, Sixteenth Judicial District, County of Traverse.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1902, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered April 25 A. D. 1902.

By the court.

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above entitled cause.

Attest: D. F. REESE, *Clerk.*

241 [Endorsed :] No. 12757. State of Minnesota, supreme court. Copy of order for judgment. Filed April 25 A. D. 1902. D. F. Reese clerk. Entered on page —.

242 STATE OF MINNESOTA :

Supreme Court, General October Term, A. D. 1901.

MONDAY MORNING, 9.30 O'CLOCK,
December 9, *A. D.* 1901

Court convened pursuant to adjournment. All the justices being present.

JOHN P. O'CONNOR, Respondent,
vs.
JACOB GERTGENS, Appellant. } Cal. No. 124. Reg. No. 12757.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above entitled cause.

Attest: D. F. REESE, *Clerk.*

243 [Endorsed :] 12757 State of Minnesota supreme court. Copy of minutes of argument. Filed April 25 A. D. 1902. D. F. Reese clerk.

[Endorsed:] No. 12757 State of Minnesota, supreme court. John P. O'Connor respondent against Jacob Gertgens appellant Judgment roll. Filed April 25 1902 D. F. Reese clerk.

STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, Darius F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said supreme court of the State of Minnesota in the case between Jacob Gertgens, appellant and plaintiff in error, against John P. O'Connor, respondent and defendant in error, including the opinion of said supreme court therein, the petition for a rehearing of said cause, and the order of said supreme court denying the same, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error, and of the bond on the writ of error and approval thereof, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and that the foregoing constitutes a true and complete return to said writ of error.

In witness whereof, I have hereunto set my hand and seal of said supreme court of the State of Minnesota at the capitol, at Saint Paul, Minnesota, this 31st day of May A. D. 1902.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota,
By J. L. HELM,
Deputy Clerk.

Endorsed on cover: File No. 18576. Minnesota supreme court. Term No. 65. Jacob Gertgens, plaintiff in error, *vs.* John P. O'Connor. Filed June 6, 1902.

IN THE

Supreme Court of the United States.

October Term, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Argument for Plaintiff in Error.

STATEMENT.

This was an action in ejectment commenced by the defendant in error against the plaintiff in error in the District Court, 16th Judicial District, in the State of Minnesota, to recover the possession of the southwest quarter of section nine (9), in township one hundred and twenty-five (125), in range forty-five (45) west.

The plaintiff in error, defendant below, filed an answer in denial and by way of counter-claim and cross-complaint alleging that he was in possession under a superior title based upon his settlement, residence, improvement, and cultivation of the tract, as public lands of the United States and his application therefor as a homestead, followed by his contest in the land department against John Ireland, plaintiff's grantor, who claimed the land under act of March 3, 1887, as a purchaser from the St. Paul, Minneapolis and Manitoba Railroad Company; and that Ireland was not a purchaser in good faith from said company within the meaning of the said act of March 3, 1887, asking that the plaintiff be declared and held trustee of the title acquired by him for the defendant's use and benefit, and that he be required by the decree of the court to properly convey the premises to the defendant by proper deeds of conveyance, and in case of his refusal or neglect so to do that the decree of the court stand in lieu thereof as a conveyance of the premises to the defendant.

To this answer plaintiff replied in denial and set up the title of his grantor by patent from the United States, based upon said application of Ireland to purchase.

The case was tried upon an agreed statement of facts which embraced the evidence upon which the land department took action in the case, with a stipulation reserving the right to either party to object to any of such evidence as incompetent, irrelevant, or immaterial.

The record shows numerous objections made by the defendant to such evidence, as well as to the additional evidence offered by plaintiff, were sustained by the trial court.

The district court held that the action of the land department in permitting Ireland to purchase the land by virtue of his alleged contract was erroneous; but that the land had been withdrawn in 1869 for the benefit of the St. P., M. and M. Railroad Company and had never been restored to settlement or entry, and hence there was no time after said date when the defendant could acquire any right by his settlement and residence on and cultivation and improvement of the land or by his application to enter the same under the homestead law.

From that decision the defendant appealed to the Supreme Court of the State.

This decision was affirmed by the Supreme Court.

From the decision of the Supreme Court of the State plaintiff in error brings the case to this court by writ of error for consideration and judgment.

The Issues.

The errors assigned raise a number of questions, the more important of which are—

1st. The question of the rights the plaintiff in error acquired by virtue of his homestead claim.

2d. Whether Ireland ever had such a contract of purchase with the railroad company as to authorize his purchase from the United States under the act of March 3, 1887, in the face of the duly asserted claim of defendant under the homestead law.

The Status of the Land.

The answer to the first question involves an examination of the record with a view to determining the exact status of the land in controversy on April 15, 1891, the date of the settlement of plaintiff in error under the homestead law.

The Withdrawal Revoked by Act of September 29, 1890.

That the land was withdrawn by virtue of section 7 of the act of March 3, 1865 (13 Stats., 526), for the benefit of the said St. P., M. & M. Railroad Company, and notice of such legislative withdrawal given by the Commissioner to the local officers May 25, 1869, is not disputed. Said section 7 is in the words and figures following, to wit:

> "Section 7. And be it further enacted, That as the governor of the said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads and branches, then it shall be the duty of the Secretary of the Interior to withdraw from the market the lands embraced within the provisions of this act."

How, and when was this withdrawal revoked? We will now address ourselves to this inquiry.

That this withdrawal was not revoked in 1887, by Secretary Lamar, because it was claimed it was a legeslative withdrawal, and, therefore, beyond the power of the Secretary to revoke it, is made clear by the Departmental decision of May 22, 1891, under the administration of Secretary Noble (12 L. D., 541). In that case, referring to the rule entered on certain land-grant railroad companies, including the St. Paul, Minneapolis and Manitoba Railroad Companies and some others, embraced in the act of March 3, 1865, on December 30, 1890, to show cause why the indemnity withdrawals for their benefit should not be revoked and the land restored to settlement and entry, the Secretary said:

> "The St. Paul and Sonix City Railroad Company state that the withdrawal of indemnity lands for their benefit was made under the provisions of the act of Congress approved March 3, 1857 (11 Stat., 195), and of the seventh section of the act of May 12, 1864 (13 Stat., 72), and that neither said section nor the act of March 3, 1857, is mentioned in nor repealed by the fourth section of the act of September 29, 1890 (26 Stat., 496).
>
> Upon examination it appears that neither the act of March 3, 1857, nor the seventh section of the act of May 12, 1864, directs the Secretary of the Interior to withdraw from market or entry the lands within the indemnity limits of the grant to said company. It appears that the indemnity withdrawal for the

benefit of this company was not revoked in 1887, when the company was cited to show cause, etc., because it was claimed in answer to said citation, as a reason why said revocation should not be made, that the 7th section of an act approved March 3, 1865 (13 Stat., 526), was a legislative withdrawal of the lands in the indemnity limits of their grant and consequently the land department had no power, in the absence of legislative action, to revoke the order of withdrawal made by direction of Congress.

The Department was in some doubt, by reason of the language of said section 7, as to the power to revoke the order. All doubt has since been removed by the passage of the act of September 29, 1890, *supra*, the 4th section of which repeals section 7 of the act of 1865, *supra*."

Section 4 of the act of September 29, 1890, above referred to is as follows, to wit:

"That section 5 of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section 7 of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said States,'

approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,'' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act of which the same is amendatory."

Secretaries Lamar, Vilas, and Noble treated it as a legislative withdrawal and did not attempt to revoke it for that reason. But, as held by Secretary Noble, *supra*, the statute making the withdrawal was repealed by the act of September 29, 1890.

What effect did this repeal of the statute have upon the withdrawal?

We insist its effect was to *put an end to the withdrawal the very moment it became a law without any action on the part of any officer or other person.*

The general doctrine is accurately stated in vol. 23, Am. and Eng. Enc. of Law, as follows:

> "A statute repealed by a later act of the same legislature is, in absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions passed and closed."

Sedgwick on the Construction of Statutes and Constitutional Law, 2d edition, page 108, states as the correct rule the one laid down by Chief Justice Tindal in Kay *vs.* Goodwin, 4th Moone and Payne, 341, as follows:

> "The effect of a repealing statute I take to be to obliterate the statute to be repealed as completely from the records of Parliament as if it had never been passed; and that it must be considered as a law that had never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."

Endlich on Interpretation of Statutes, section 478, thus states the rule:

> "As to all future matters, all steps yet to be taken the repealed statute upon which they are based is treated as utterly obliterated."

Again, in section 480, it is said:

> "The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If, at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone."

Maxwell on Interpretation of Statutes, page 377, quotes Lord Tenderden's decision in Surtees *vs.* Ellison, 9 B. & C., 750, as follows:

> "When an act expires or is repealed, it is considered, in absence of provisions to the contrary, as if it had never existed, except as to transactions passed and closed."

Potters Dwaris on Statutes and Constitution, Edition 1878, states the rule as follows:

> "When an act of Parliament is repealed it must be considered (except as to cases passed and closed) as if it had never existed" (page 160).

Again, the same author at page 155, says:

> "A repealing statute, is a total abrogation of the law repealed, but rights acquired, and which became perfect under the law before its repeal, are not affected by the repeal."

Southerland on Statutory Construction, page 137, lays down the rule thus:

> "A repeal will take effect from any subsequent statute which the legislature gives a clear expression of its will for that purpose."

In section 162, it is said:

> "The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transaction passed and closed, as though it never had existed."

This is followed in section 163 by the following statement:

> "Rights depending on the statute and still inchoate not perfected by final judgement or reduced to possession, are lost by repeal or expiration of the statute."

In the case of William H. McArdle, 7 Wall., 506, this court said:

> "The general rule, supported by the best elementary writers (Dwaris Stat., 538,) is, that when an act of the legislature is repealed, it must be considered, except as to transactions and matters passed and closed, as if it never existed."

This court has also held that the repeal of a statute giving a penalty, puts an end to all actions pending at the time of the passage of the repealing statute. Yeaton *vs.* The United States, 5 Cranch, 281; Schooner Rachel *vs.* The United States, 6 Cranch, 329; Norris *vs.* Crocker, 13 How., 429; U. S. *vs.* Passman, 4 Dall., 272.

Sedgewick, at page 111, says the same rule applies to all proceedings, whether civil or criminal, going on by virtue of a statute at the time of its repeal.

We are not aware of any decision of the Department, upon this question, as applied to this particular repealing statute.

But, in the case of Katharine Davis, decided August 9, 1900 (30 L. D., 220), involving a withdrawal made under the act of July 22, 1854, of lands claimed under Spanish or Mexican grants, the Department held that upon the final decision of the

Supreme Court of the United States rejecting the grant in controversy, the land was immediately opened to settlement and entry. We quote from said decision as follows:

> "While this appeal was pending the Department received your letter of January 11, 1900, conveying the information that the judgment of the Court of Private Land Claims rejecting this grant had become final. In said letter you refer to the cases of Katharine Davis and Clinton D. Hoover, pending before the Department upon appeals from the action of your office rejecting application to enter lands within the limits of said claim, and you submit for consideration the question 'whether the final judgment of the court *ipso facto* opened the lands to entry, or whether the formal act of restoration remains within the jurisdiction of that department of the executive having control of the public lands.' You state that the order reserving the lands emanated from the land department and express the opinion that before the lands reserved to satisfy the Algodones grant will become subject to entry, it will be necessary for the land department to revoke the order of reservation.
>
> The reservation provided for by the act of July 22, 1854, *supra*, did not depend for its efficiency upon the ministerial action of the land department in giving notice of the withdrawal, but it became immediately operative by force of the statute upon all lands within the ceded territory covered at the time by any Spanish or Mexican claims which originated prior to the treaty of cession, and the reservation of the lands continued until the final

> action on such claim, whether such action was by Congress under the act of July 22, 1854, or by the Court of Private Land Claims under the act of March 3, 1891, *supra*. * * *
>
> It therefore follows that on the final adjudication and rejection of said claim the lands embraced therein became at once opened to settlement and entry without any formal order on the part of the land department announcing the determination of the reservation."

This seems to be a parallel case. There was a legislative withdrawal, and although, as stated by the Commissioner, "the order reserving the lands emanated from the land department" and he expressed the opinion that before the lands would become subject to entry, it would be necessary for the land department to revoke its order of reservation, the Department dissented from this view, and held that "the reservation provided for by the act of July 22, 1854, *supra*, *did not depend for its efficiency upon the ministerial action of the land department in giving notice of the withdrawal, but it became immediately operative by force of the statute*" etc. And of course it followed logically that it was not at all necessary to revoke this unimportant ministerial action of the land department in giving notice of a statutory withdrawal, in order to restore the land to the public domain.

This must be the correct rule. Any other would put it in the power of the Department to thwart, postpone, or entirely defeat the purpose of Congress. If the efficiency of the action of Congress in legislation to put an end to a withdrawal made by

it, depended upon the Department giving notice of such legislation, it might be postponed eight years, or indefinitely, instead of eight months, as was the case in giving notice of the act of September 29, 1890. If the Department had refused to give the formal notice of the act of Congress repealing the withdrawal it had made by a previous act, would it be contended such refusal to act would wholly defeat the purpose of Congress and render the act nugatory? If not, then his action would neither give efficiency to, nor in anywise postpone or defeat, the immediate operation of the repealing statute.

No one can doubt the purpose of Congress in passing this repealing act. That body knew from a special message of the President, embodying a report to him of Secretary Vilas that he was powerless to revoke this statutory withdrawal and upon his recommendation and that of the President this act to put an end to the withdrawal was passed.

That it did immediately put an end to it just as effectively as if the act had said in so many words that "from and after the passage of this act all indemnity lands not embraced in approved selections shall be restored to settlement and entry," we have no doubt, and feel sure, that a careful consideration of the question, such as it will receive by this court, will result in such holding.

This being the correct view, *there was no withdrawal whatever* in force when Gertgens made his settlement on the land April 15, 1891, *and the land was subject to his settlement*, no vested rights having been acquired by the railroad company by

its illegal selection of 1885, which was subsequently abandoned and cancelled. (See Exhibit "H"–1 Record, p. 100.)

To thus hold would disturb no rights of the railroad company, for, as held by both this court and the Department, the company acquired no vested right in any tract of land within its indemnity limits until its selection was approved by the Secretary. Upon this point this court, in the late case of Oregon & California Railroad Company *vs.* United States, No. 186, October term, 1902, speaking through Mr. Justice Harlan, said:

> "As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

Again, in the same decision, after referring to and quoting from former decisions of the court, the true doctrine is thus stated:

> "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, *no right* of the railroad company *attaches or can attach* to specific lands within indemnity limits until there is a selection *under the direction, or with the approval of* the Secretary."

Secretary Lamar, in the case of the Atlantic & Pacific Railroad Co. (6 L. D., 84), after revoking

the indemnity withdrawal made for the benefit of that company, thus defined his purpose, and the effect of said decision:

> "I therefore direct that all lands under withdrawals heretofore made and held for indemnity purposes under the grant to the Atlantic & Pacific Railroad Company *be restored* to the public domain and *opened to settlement* under the general land laws, except such lands as may be covered by *approved selections*."

Again, in the special circular of September 6, 1887 (6 L. D., 131), which provided the machinery for disposing of the lands theretofore embraced in indemnity withdrawals, it is said:

> "The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by *approved* selections, by which is meant selections which have been *approved* by the Commissioner of this office and the *Secretary of the Interior*."

The selections covering the land in controversy not only were *not approved*, but, as the record shows, no valid base was assigned for the selections of the company, and on August 15, 1891, it, by the filing of a new list, in the language of the Commissioner in his letter of July 17, 1896 (Record, p. 100), "giving a different and entirely new basis, the company abandoned its original selection, and it must stand or fall by the substituted list."

It is thus shown that the selection which was in existence at the date of the passage of the act of September 29, 1890, was illegal, and, in our opinion, wholly void for any purpose, its illegality being recognized by the company and abandoned in August following.

Certainly no injustice could be done the company by holding that the act of 1890, repealing the statutory withdrawal, *ipso facto*, restored the land in controversy to settlement.

The Secretary's Order of May 22, 1891.

We have seen that the withdrawal made by the act of 1865 was revoked by the repealing act of 1890, and was without any legal force or vitality after that date, and hence no bar to Gertgens' settlement.

On May 22, 1891, the Secretary, to use the language used by Mr. Justice Field in reference to the statutory withdrawal in favor of the Northern Pacific Railroad Company in delivering the opinion of this court in the case of St. Paul and Pacific Railroad Company *vs.* Northern Pacific Railroad Company, 139 U. S., 1, formally announced the revocation of the withdrawal by giving publicity to what the law itself declared.

If any obstacle existed to the attaching of settlement rights to the lands embraced within the limits of this indemnity withdrawal prior to that date, it was entirely removed by this order of the Department. This the land department has uniformly held ever since that date.

In support of this statement we call attention, among others, to the following cases:

> St. Paul, Minneapolis and Manitoba Railroad Company *vs.* Hastings and Dakota Railroad Company, 13 L. D., 440, at bottom of page 447.

In Thuenie *vs.* St. Paul, Minneapolis and Manitoba Railroad Company, 14 L. D., 545, Secretary Noble said:

> "This withdrawal was not revoked until May 22, 1891, under the authority of section 4 of the act of Congress approved September 29, 1890," *supra.* * * *

Again he said:

> "The language of section 6 here referred to is identical with section 3 of the act of March 3, 1865, before quoted, and while in the Wisconsin Central case the withdrawal was but an executive order, in the present case it was directed by the act making the grant, and required congressional action before the withdrawal could be revoked."

To the same effect is the case of Erickson *vs.* The St. Paul, Minneapolis and Manitoba Ry. Co., 19 L. D., 423; St. Paul, Minneapolis and Manitoba Ry. Co. *vs.* Hagen, 20 L. D., 249, and St. Paul, Minneapolis and Manitoba Ry. Co. *vs.* Rowan *et al.*, 22 L. D., 610.

In the Rowan case Secretary Smith not only held the withdrawal was revoked May 22, 1891, but that

the selection list (No. 10), which embraced the land in this case, was no bar to the allowance of the homestead application of Rowan and others, and directed that the land be disposed of without reference to them.

In the case of Vandeburgh *vs.* Hastings and Dakota Ry. Co. *et al.*, 26 L. D., 390, decided by Secretary Bliss, referring to the Departmental decision in 13 L. D., 440, involving the same withdrawal, it was said:

> "Prior to the date of said decision, to wit, on May 22, 1891 (12 L. D., 541), in accordance with the provisions of the 4th section of the act of September 29, 1890, the indemnity withdrawal formerly made on account of this grant was revoked and the lands restored to the public domain."

In the case of Wolke *vs.* The St. Paul and Northern Pacific R. R. Co., 27 L. D., 404, Secretary Bliss said:

> "The records of your office show that this land was withdrawn from settlement and entry on July 10, 1865. This withdrawal was revoked on May 22, 1891."

Again, further on in the same decision, he said:

> "The order of withdrawal was revoked on May 22, 1891, *and from that date* until February 12, 1892, the time when the company selected the land, said tract was subject to *entry and settlement*.

> Therefore, if Wolke was a qualified homestead settler upon the land on May 22, 1891, his right to the same is superior to that of the railroad company."

See also—

Hastings & Dakota Ry. Co. *vs.* Pattis, 30 L. D., 106.

Gorden *vs.* St. Paul, Minneapolis & Manitoba Ry. Co., 24 L. D., 434, and Hastings & Dakota Ry. Co., 18 L. D., 511, decided by Secretary Smith.

We are quite sure no decision of the Department can be found, made subsequent to May 22, 1891, holding the contrary.

This being the case, there can be no question but that, if Gertgens' settlement rights did not attach on April 15, 1891, when he settled, by virtue of the revocation of the withdrawal made by the repealing act of 1890, they did attach on May 22, 1891, upon this Departmental revocation of that date, he being at that time a qualified settler upon the land.

We insist, therefore, that the withdrawal was made by *statute* and was revoked and the land *ipso facto* restored to the public domain by the *unconditional repeal* of the statute making it, and as the railroad company had acquired no vested rights by virtue of its selection, it was restored, *eo instanti* to both settlement and entry, without any action of the Department.

But, in any view of the case, the Secretary's order of May 22, 1891, formally announcing the

repeal of the statute making the withdrawal, effectually obliterated the executive action of May, 1869, announcing the statutory withdrawal of 1865, if it ever had any effect. And, under the decision of the Department in the Rowan case, *supra*, the land was then subject to Gertgens' *entry* as it had been to his settlement since September 29, 1890, or at least since May 22, 1891, and his application made in 1895, based upon his settlement in 1891, should have been allowed.

The Effect of the Decision of May 22, 1891.

Having shown conclusively, by the uniform ruling of the Department, that the decision of May 22, 1891, *took effect* from its date, the inquiry which would logically arise is, *what was its effect upon the status of the land?*

This question also has been fully settled by Departmental ruling, as well as by the uniform practice in all similar cases.

The last paragraph of the decision of the Secretary of May 22, 1891, *supra*, and which contains the direction to the Commissioner for the disposal of the lands involved is as follows:

> "I, therefore, direct that after giving the usual notice, all lands under withdrawals heretofore made and held for indemnity purposes under the grants to said roads be restored to the public domain and opened to settlement and entry in accordance with rules heretofore established in similar cases." (12 L. D., 541, bottom p. 544. Record, p. 93.)

What are the "rules heretofore established in similar cases," in accordance with which these lands were to be disposed of? Again, we are not left in doubt, as the Department has considered and settled this question also.

In the case of O'Brien *vs.* Chamberlin (29 L. D., 218), this precise question arose and was set at rest by the decision of Acting Secretary Ryan, who decided as follows:

> "In the answer filed to the appeal it is urged that the circular of September 6, 1887, *supra*, had no application to the lands within the limits of the grant under consideration, the same being included in a legislative withdrawal at the time of the issue of said circular, and that it was not incumbent upon Annie O'Brien to present her application until after the formal cancellation of the railroad selection, October 23, 1896.
>
> While it is true that this land was included within a legislative withdrawal at the time of the issue of the circular of September 6, 1887, yet such withdrawal was subsequently revoked by Departmental order May 22, 1891 (12 L. D., 541), and by the terms of that order the lands were restored to settlement and entry 'in accordance with the rules heretofore established in similar cases.' The rules 'established in similar cases' must have had reference to the circular of September 6, 1887, being the special circular governing the restoration of railroad indemnity lands. By the terms of said circular it was provided as follows:
>
> As to lands covered by unapproved selections, applications to make filings and entries

thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers." * * *

This "special circular governing the restoration of railroad indemnity lands," may be found in (6 L. D., p. 131), and is as follows:

Restoration of Indemnity Lands.

Circular.

WASHINGTON, D. C., September 6, 1887.

The Hon. Secretary of the Interior having revoked the indemnity withdrawals heretofore ordered for the benefit of certain railroad and wagon road companies and directed that all lands embraced therein be restored to the public domain and opened to settlement under the general land laws, the following is submitted in answer to the numerous inquiries relative thereto:

The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by approved selections, by which is meant selections which have been examined and approved by the Commissioner of this office and the Secretary of the Interior. It is provided, however, that the order of restoration shall not affect rights acquired

by grantees within the primary or granted limits of any other congressional grant.

As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to this office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in

favor of the company, and no appeal be taken, the land will be certified to the Secretary of the Interior for approval for patent without requiring further action on the part of the company except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be cancelled and the filing or entry allowed subject to compliance with law.

Lands which have not been selected will be subject to settlement and entry as other public lands, and notice to the company will not be required.

The Secretary's orders revoking said indemnity withdrawals take effect from the date of the issue thereof (see Appendix A), so as to open the lands embraced therein to settlement, but filings and entries of said lands will not be received until notice of the restoration shall have been given by a public advertisement for a period of thirty days, it being the intention of the order of revocation that as against actual settlement thereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights, both of the company and of the settlers, attaching prior to the issue of the Secretary's order, will be determined by the facts in each case.

The necessary instructions for the restoration of the lands affected by the Secretary's orders have been issued to the registers and receivers for the land districts in which the lands are situated (see Appendix B), to whom application to enter, or for any further information, should be made.

The restoration as ordered is to entry under the general land laws relating to settlement. Private cash entries of the restored lands will not be allowed.

S. M. STOCKSLAGER,
Acting Commissioner.

Approved:

H. L. MULDROW,
Acting Secretary.

It will be observed, the second paragraph of this circular provides as to lands covered by approved selections as follows:

> "The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by *approved* selections, by which is meant selections which have been examined and approved by the Commissioner of this office and the Secretary of the Interior." * * *

This is followed by the machinery for attacking unapproved selections, by persons applying to make filings and entries.

Then follows the emphatic statement, that the order of restoration *took effect from the date of the issue thereof*, so as to open the lands embraced therein *to settlement*, but *filings and entries* should not be received until after the thirty days' period of publication, as follows:

> "The Secretary's orders revoking said indemnity withdrawals take effect from the date of the issue thereof (see Appendix A), so as to open the lands embraced therein to settlement but filings and entries of said lands will not be received until notice of the restoration shall have been given by a public advertisement for a period of thirty days, it being the intention of the order of revocation that as against actual settlement, thereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights, both of the company and of settlers, attaching prior to the issue of the Secretary's order, will be determined by the facts in each case."

Nothing could be plainer or clearer than this circular, issued under the administration of Secretary Lamar, for the disposal of the lands included within the limits of the indemnity withdrawals revoked by him, embracing all, or nearly all, of the withdrawals which were not legislative.

In its scope it covers the three classes of cases:

(1) Approved railroad selections.

(2) Unapproved selections, and—

(3) Lands not selected.

The first, approved selections, are, of course, excepted from the operation of the order of restoration.

The second, or unapproved selections, were *restored to settlement, but not to entry*, until after thirty days' notice.

The rights, both of the company and settlers, attaching prior to the issue of the Secretary's order were to be determined by the facts in each case.

This special circular, so full and complete, has been followed ever since its date, and to-day, governs the land department in the disposal of all lands restored to the public domain, which were heretofore covered by railroad grants.

That Commissioner Stone understood the Secretary's order and direction, contained in his decision of May 22, 1891, required him to follow this circular in the disposal of the lands involved is shown by his letter of May 28, 1891, promulgating that decision.

After stating that he is acting under the instructions contained in that decision, and requiring thirty days' notice to restore the lands to *entry*, he says:

> "In the disposition of application for lands embraced in pending selections by said company, you will be governed by the rules established for the disposition of all applications under the orders of August, 1887, viz:"

Then follows all that part of said special circular of September 6, 1887, *supra*, governing the disposal of lands embraced in unapproved selections.

This leaves no doubt, so far as the land department is concerned, that the same doctrine was applied, and the same rules governed the disposition of the lands embraced in unapproved selections

affected by the order of May 22, 1891, as were applied to, and governed in, the disposition of similar lands embraced in indemnity withdrawals revoked by Secretary Lamar, in the lands restored in 1887.

And in point of fact, the land involved in this action, was disposed of precisely in accordance with said special circular.

The Decision of the Supreme Court of Minnesota.

In the face of this long and unbroken line of decisions of the Department, covering a period of more than twelve years, and including the administrations of Secretaries Lamar, Noble, Smith, Bliss, and Hitchcock, construing and applying this order of revocation of May 22, 1891, as *effective from its date*, the Supreme Court of Minnesota in the case at bar held "it did not of itself, affect the previous order of withdrawal."

The reason of the court for so holding is thus stated:

> "Counsel for defendant are in error when asserting that the Secretary's action revoked the order. On May 28, of the same year, the Commissioner directed the register and receiver of the St. Cloud District, in which this land was situated, to restore to the public domain and open to settlement and entry all lands in the district theretofore withdrawn, situated within the indemnity limits of the grant "not

> embraced in the selections heretofore made or applied for by said railroad company." This order, as will be seen, expressly reserved from its operation all lands which had been selected or applied for by the company, and among them was this particular tract of land. It expressly directed that there be open to settlement and entry all indemnity lands not selected or applied for, but in no manner did it revoke the previous order of withdrawal, in so far as that order and the subsequent selection affected and withdrew from the public domain the 160 acres in dispute."

If it be conceded that the intention of the Commissioner was to continue the withdrawal, or that the language used by him could be construed as having such effect, *it was totally beyond his power to do so.* For whether it be held the repealing act of September 29, 1890, put an end to the withdrawal or not, it certainly took away the power to make any further or additional executive withdrawals on account of said grant.

Neither could the Commissioner in any wise limit the full force and effect of the decision of the Secretary revoking the indemnity withdrawal and ordering that the lands embraced therein "be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases."

We are satisfied he did not intend to limit its effect, and we think the court is in error in holding the language used, taken in connection with the

order, and the subsequent action after the selections were cancelled, is open to any such construction.

While the letter of Commissioner Stone of May 28, promulgating the Secretary's decision of May 22, 1891, might have been couched in language which would have made his purpose clearer, yet a careful analysis of the whole letter leaves no doubt whatever as to its meaning, and shows that it is in entire harmony with the instructions of the Secretary. It will be observed that in the first sentence he says:

> "*Under instructions from the honorable Secretary of the Interior dated May* 22, 1891, you are directed," &c.

This makes it clear he intended to do nothing except to carry out the instructions of the Secretary.

But the Supreme Court of Minnesota held that because he said:

> "You are directed to restore to the public domain and open *to settlement and entry* all lands heretofore withdrawn in your district within the indemnity limits of the grant for the St. Paul, Minneapolis & Manitoba Railway Company and *not embraced in selections heretofore made or applied for by said company.*"

He intended to, and did, continue the railroad withdrawal, or, at any rate entirely except from the operation of the order of revocation and restoration, *all* lands covered by selections or applications to select.

Now, it is too clear for doubt that strictly speaking this language is accurate, and is in accordance with the Secretary's order for the restoration to the public domain and opening to *settlement and entry* of the lands "in accordance with the rules heretofore established in similar cases."

These rules did not open the lands embraced in *unapproved selections* (as were those in this case) to *entry* at the date of the revocation of the withdrawal; but, on the contrary, thirty days' notice was required to be given by the local officers before the land was subject to *filings or entries; but not so as to settlement.* And hence, when Commissioner Stone referred to lands open to *both settlement and entry*, he very properly excluded those embraced in unapproved selections and applications to select.

If there was any room for doubt, the subsequent paragraphs of his letter would remove it.

In a subsequent paragraph he directs the local officers to fix a date not less than thirty days and give public notice "when the lands will *be open to entry.*"

He still further makes the whole matter so perfectly clear, that it would seem no one could have any doubt, by the following directions:

> "In the disposition of applications for lands *embraced in pending selections* by said company, you will be governed by the rules established for the disposition of applications *under the orders of August*, 1887."

He then proceeds to set out some of the provisions of that special circular.

As we have already pointed out and quoted from that circular, it was stated in so many words that from its date all the lands embraced in the indemnity withdrawals, *except* "such lands as were covered by *approved selections*," were restored to the public domain and opened *to settlement from the date of the order*, but *not restored to entry* until after thirty days' notice should be given.

This is the "special circular" which the Department held in the Chamberlin case, *supra*. Secretary Noble meant in his order of May 22, 1891, and Commissioner Stone frees the question from all doubt by directing the local officers to dispose of the lands covered by unapproved selections in accordance with that circular; and, as before remarked, they were disposed of in accordance therewith.

As before stated, if Commissioner Stone had intended to continue the railroad withdrawal, as the Supreme Court of Minnesota held he did, and had so directed in unmistakable terms, his action would have been *ultra vires*.

That court cited numerous authorities tending to show the power of the executive department to make withdrawals of the public lands. No one questions that power when exercised in pursuance of law. But the Congress has the exclusive power to dispose of the public lands, and neither the Commissioner nor the Secretary have any power

whatever to either withdraw, or dispose of the public lands, *except as authorized by Congress*

Northern Pacific Railroad Co. *vs.* Davis (19 L. D., 87); and—

Northern Pacific Ry. Co. *vs.* Ayres (24 L. D., 40), quoted approvingly in S. P. R. R. Co. *vs.* Bell, (183 U. S., 675).

The old doctrine that any withdrawal made by the executive department, whether rightfully or wrongfully made, was a bar to the acquisition of settlement rights so long as it continued, received its first rude shock in the Department, in the decision of Secretary Vilas, in the case of Northern Pacific R. R. Co. *vs.* Miller (7 L. D., 100), wherein he held that "the statutory withdrawal once exercised was exhausted and could not be repeated." And that, as a consequence, "a tract of land not within the limits of the statutory withdrawal on general route of 1870, but falling within the indemnity limits on definite location, was free from the *operation of the grant, and subject to appropriation under the general land laws.*"

That decision has been followed in the adjustment of that grant ever since it was made, although strenuous efforts were made by the railroad company to have it reversed on motion for review and rehearing.

This decision was based upon the ground that there was an implied prohibition of this withdrawal and hence, being in violation of law, did not prevent the acquisition of settlement rights.

So, in the case at bar. If the statutory withdrawal made by virtue of the 7th section of the act of March 3, 1865, once exercised was exhausted, and could not be repeated, how could the Commissioner, after its revocation by the 4th section of the act of September 29, 1890, and the order of the Secretary of May 22, 1891, repeat, renew, continue, or extend this statutory withdrawal?

The argument of the Supreme Court of Minnesota in reference to the executive power of the Secretary to make withdrawals, whether sound or not, is totally inapplicable to the case. There was never any pretense that the withdrawal order of 1869 was made under the "plenary power" of the Secretary, but, on the contrary, as heretofore shown, *strictly in pursuance of the statutory mandate.*

If it had been considered by the land department that it was an executive withdrawal, as contradistinguished from a legislative withdrawal, it would have been revoked in 1887 along with the other revocations.

And, it might be added, this view as to the power of the Secretary to make withdrawals was pressed upon the court in the case of Hewitt *vs.* Shultz, *supra*, which case was reviewed and followed by an unanimous court in Southern Pacific Railroad Co. *vs.* Bell (183 U. S., 675), and was followed in the still later case of Nelson *vs.* Northern Pacific Railway Co. (188 U. S., 108).

This court, in the case of Hewitt *vs.* Shultz, 180 U. S., 139, and Nelson *vs.* Northern Pacific Ry. Co.,

188 U. S., 108, approved and followed Secretary Vilas' decision in the Miller case, *supra*.

In the case of Oregon & California Railroad Co. *vs.* The United States, No. 186, October term, 1902, decided by Mr. Justice Harlan April 6, 1903, this court go a step farther and hold that a withdrawal, which though not *prohibited* by Congress, if unauthorized, is no bar to settlement. In that case the court said:

> "We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made and notice thereof given at the local land office. It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered section within those limits; nor did that order prevent the *bona fide* occupancy by settlers within such limits up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits."

In the face of these authorities, to say that in a case where, upon the recommendation of the Secretary of the Interior and the President of the United States, Congress repealed the statute which made the statutory withdrawal for the express purpose of putting an end to it, and in defiance of the order of the Secretary of May 22, 1891, that one of the Secretary's subordinate officers could continue and keep in force that withdrawal, with due

deference to the Supreme Court of Minnesota, seems to us to border on the ridiculous.

The Railroad Selections.

The Supreme Court of Minnesota also held that the Commissioner of the General Land Office, in his decision of October 23, 1896, finally cancelling the selection (list No. 10, St. Cloud, Minn.), which covered the land in controversy, and restoring the lands to the public domain, "expressly excluded from its operation," this and other lands which had previously been applied for, and in the language of the court, "as to it the original order of withdrawal remained in full force."

The language which is given this most extraordinary construction, which never occurred to the land department, but was first announced by the Minnesota court, is as follows:

> "The said decision is accordingly declared final and the *tracts in said list cancelled on the records of the office.* You will so note on your record.
>
> A large portion of these lands have been applied for by parties claiming them under the settlement laws, and by John Ireland, who claims under act of March 3, 1887 (25 Stat., 556), as a purchaser from the St. Paul, Minneapolis and Manitoba Ry. Co.
>
> No disposal will be made of these lands until the above claims are adjudicated by this office." (Record, p. 101.)

What is the meaning of this plain and simple instruction of the Commissioner to the local officers? It is merely that, *having cancelled the selection* as to all the tracts embraced in the list, he informs them that as to a large portion of the tracts their are two or more claims on file, and that they will make no (other) disposition of the lands until these claims are adjudicated by him. This is perfectly evident, as on the very next day, October 24, 1896, he directed them to order a hearing on Ireland's application to purchase, and added:

> "You will accordingly advise him that he may now come forward (the railroad claim having been disposed of), and make publication, *being careful* that in addition to the published notice, all parties now known, or who may become known before the closing of the case before you, to be adverse claimants to any of said lands, are *given special notice* thereof."

Also—

> "The tracts applied for are all within a few miles of each other and are so great a distance from your office that the proof should be made in their vicinity to enable the adverse claimants to appear and make such showing as they may desire without unnecessary expense," etc. (Record, p. 104.)

In the case of the Hastings and Dakota Railway Co. (18 L. D., 511), Secretary Smith, referring to the time of taking effect of the decision cancelling that company's selections, said:

"The point made by Commissioner Stone that, though the Departmental decision was made on October 23, 1891, it did not become effective until the former selections, which covered said lands, were actually cancelled on the records of the local office, which was some time in November, 1891, does not commend itself to me, but seems to be in entire discord with well-settled rules and numerous decisions of this Department. Your predecessor states that though the decision was signed October 23, it was not promulgated until the 30th, was not received by him until November 1, and not mailed to the local office until November 21, 1891.

By a long line of decisions it is settled, that cancellation takes effect as of the date when the decision is rendered, the entry of the order of cancellation on the records being a mere ministerial act of the officers, which, when made, takes effect by relation as of the date of the judgment. (Pomeroy *vs.* Wright, 2 L. D., 164; Anderson *vs.* Northern Pacific R. R. Co., 7 L. D., 163; Dahlstrom *vs* St. Paul, Minneapolis and Manitoba Ry. Co., 12 L. D., 59; Coder *vs.* Lotridge, Id., 643; Lough *vs.* Ogden, 17 L. D., 171; Perrot *vs.* Connick, 13 L. D., 598.) The judgment of cancellation in this case being rendered on October 23, the lands were properly subject to the selection made by the Hastings and Dakota Railway Company, on the 29th, or six days thereafter."

If the railroad claim, withdrawal, selection, and every claim of any character which it, or any one claiming under it, could possibly urge, had not been fully and completely adjudicated and disposed

of, the Department would have had no power whatever to consider Ireland's claim as a purchaser under the act of March 3, 1887. His claim rested solely upon the ground that he had purchased from the company the land, which, for "any reason was *excepted from the operation of the grant to the Company.*" (5th sec., act March 3, 1887.)

It follows the land department must have held the land was excepted from the operation of the grant, or the claim could not have been considered.

This is also made clear by the letter of October 24, 1896, *supra*, which ordered the hearing. After stating that the local officers on March 20, 1896, had transmitted Ireland's application to purchase this and other tracts, which was refused by them, and instructions asked, the letter proceeds:

> "By letters of July 17 and July 18 last the lists of the company containing these lands, 10 and 11 Fergus Falls, and No. 7 of your office, were held for cancellation, and on October 23, 1896, *were cancelled*, no appeal having been taken. Therefore, there is no objection to the allowance of the publication of Ireland to make proof of his purchase after usual notice," etc.

This simply means that, as the entire railroad claim is wiped out, applications to purchase under the act of March 3, 1887, may be considered. Prior to that date Ireland's application was premature, and might have been rejected for that reason.

But, if these letters left any remaining doubt that the selection was completely disposed of and the

lands opened to entry October 23, 1896, the decision of the Commissioner on the contest between Ireland and these settlers, in which a hearing was ordered, bearing date February 3, 1898 (Record, p. 52), and in which the land was awarded to Ireland, would entirely remove it.

In that decision the Commissioner, referring to these selections, said:

> "These selections were pending before this office on October 23, 1896, when they were cancelled and the lands restored to settlement and entry, subject to such rights as might have been acquired under the act of March 3, 1887."

Again, further on in the same decision, he said:

> "When these selections were cancelled, the lands were restored to settlement and entry by any qualified applicant under the homestead law, subject to any existing right of purchase under the 5th section of the act of March 3, 1887."

He then proceeded to hold that settlers who had contracts under Ireland's first agreement with the company, were *bona fide* purchasers under said act but that they might make homestead entries if they so preferred, thus holding the land was subject to homestead entry on and after October 23, 1896.

That no attempt was made by the Department to renew or extend the withdrawal of these lands, is still further and conclusively shown, as before

stated, by the consideration that Ireland had no right to present his claim under section 5 of the act of March 3, 1887, until the railroad grant had been finally adjusted and it had been finally determined that the land claimed was "excepted from the operation of the grant."

Northern Pacific Ry. Co. *vs.* Biggs *et al.* (31 L. D., 254), and—
Nicholas Cochens (11 L. D., 629).

Such adjustment and extinguishment of the railroad title was declared by the Commissioner's final decision of October 23, 1896, when list ten was finally cancelled and the land thus excluded from the grant.

How then could, or why would, the land department in the same decision, as claimed by the Supreme Court of Minnesota, *perpetuate* the former withdrawal in aid of the extinguished railroad title.

Settler's Right to Make Entry not Affected by Selections.

The theory that this illegal selection was in the way of settlers was an after thought, and never occurred to Ireland's counsel, who joined in the stipulation of facts before the local officers. It was there stipulated only, that these settlers knew when they settled that the land was "then under a *withdrawal* for railroad purposes under claim by the railway company as indemnity lands." No suggestion was made as to a railroad *selection*. It

had been cancelled October 23, 1896, and this stipulation was entered into January 21, 1897. (Record, p. 39.)

Again, in the case of Ashelman *vs.* Northern Pacific R. R. Co. (23 L. D., 513), the Department held:

> "If the company's selection was invalid, Ashelman was denied a right. (He was an applicant for homestead entry) by the action of the local officers in rejecting his application for conflict therewith, and he should be recognized in his right, if any be gained under his application, from the date of its presentation. Should the company fail to appeal from your decision Ashelman will be accorded rights under his application as of the date of its presentation; and in the event that the company appeals, its rights in the matter will depend upon the legality of its selection."

This is a parallel case. The Commissioner held the company's selection of the land in controversy to be illegal and held it for cancellation, from which holding the company failed to appeal and the decision became final. What then was his duty under the Ashleman decision? Evidently to allow Gertgens' application as of the date of its presentation, November 27, 1895.

In the Rowan case, *supra*, involving this identical list, the Department held the withdrawal was revoked May 22, 1891, and the selection was illegal, and that the land should be disposed of to homestead claimants without reference to the withdrawal or selection.

Gertgens attacked the railroad selection, and appealed from the decision rejecting his application for conflict therewith, and under the doctrine enunciated in the Ashelman case, approvingly quoted by Secretary Hitchcock in the late case of Falje *vs.* Moe (28 L. D., 371), his application should have been allowed by the Commissioner as of the date of its presentation, the selection having been held to be illegal.

The Cunningham Case.

But, notwithstanding the withdrawal and the railroad selection, we insist that, under the doctrine enunciated by this court in the case of Lake Superior Ship Canal Co. *vs.* Cunningham (155 U. S., 354), decided by Mr. Justice Brewer December 10, 1894, Gertgens' rights as a *bona fide* settler attached at the date of his settlement.

In that case it was held that, although a settler knew the land settled upon by him was covered by a railroad or canal grant, and withdrawal for its benefit, and that the land had been actually certified to the State under such grant, he could initiate a *bona fide* homestead claim upon such land in anticipation of forfeiture of said grant or grants.

The direct question was presented to the court whether such settler was a *bona fide* homestead settler within the meaning of the act of March 2, 1889, which act provides that the confirmation declared should not extend to any tracts "upon which there were *bona fide* pre-emption or home-

stead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

The court answered it in the affirmative, which opinion was based upon the following reasoning:

> "It does not appear that he knew the exact condition of the outstanding claims. If he did, he knew that this railroad grant had been outstanding thirty-two years; that the land was to be restored to the Government if the road was not completed within ten years, and that twenty-two years had passed since the time fixed by Congress for the completion of the road, and nothing had been done. His expectation was (and under the circumstances not an unreasonable one) that Congress would at some near time interfere to remove all this outstanding claim. Under these circumstances, and in expectation of such removal, he enters upon the land. Can it be said that his entry and occupation was with a view of depriving anybody of title, or that it was, as against the company, a wrongful entry? If the construction contended for were accepted, it would exclude from the benefit of the act any settlers upon these lands who knew that the land he entered upon was within the railroad grant."

In the case at bar we have a much stronger case. If Gertgens "knew the exact condition of the outstanding claim," he knew that this railroad grant had been outstanding thirty-four years; that in 1865 the grant was increased and all the lands

embraced in the act were withdrawn by statute; that the company made indemnity selections in 1885, as admitted by it, of 200,000 acres in excess of its losses (letter of Secretary Smith, Record, p. 95); that said selections were upon their face illegal, no base having been assigned, as required by the regulations of the Department (Commissioner's decision July 10, 1896, Record, p. 98); that the withdrawal would have been revoked in 1887 but for lack of power in the Secretary to revoke it, it having been made by statute; that this fact was reported to the President of the United States by Secretary Lamar in his public annual report for the year 1887; that on April 3, 1888, Secretary Vilas, in a communication to the President, set forth the same fact and recommended the repeal of this statutory withdrawal, which letter was transmitted to Congress, and is Public Executive Document 246, 50th Congress, 1st Session; that September 29, 1890, in accordance with such recommendation, Congress did pass an act repealing said statutory withdrawal. All of these facts were public property April 15, 1891, when he made his settlement and established his residence on the land, anticipating no doubt but that he would be permitted to obtain title to it, his good faith being shown by his placing $1,200 worth of improvements upon the land and breaking and cultivating 110 acres of it. It follows that it was just as well known in April, 1891, when Gertgens made his settlement, that the railroad company had no valid claim to the land as

it was, October 23, 1896, when its selections were finally cancelled.

While living upon the land, cultivating and improving it, and earning the land by such residence and cultivation, he learned something of the devious ways of railroad companies in the land department, in reference to their land grants. He learned that on the 22d day of May, 1891, the Secretary formally gave notice of the repeal of the statutory withdrawal; that on the 28th day of May, 1891, the Commissioner promulgated that order of the Secretary; that on August 15, 1891, said railroad company withdrew its illegal specification of losses, abandoned its selection, and substituted as a base, lands lost on the St. Vincent Extension, which this court (St. Paul & Pacific Railroad Company *vs.* Northern Pacific Railroad Company, 139 U. S., 1.) had previously (March 2, 1891) held to be a separate and different grant; that notwithstanding these facts, on application of the company, the Secretary suspended all action upon these excess lists until he should be further advised (Record, p. 95); that on October 1, 1895, a year and a half thereafter, the Secretary revoked his former order of suspension, and directed the Commissioner to proceed with the adjustment of the grant under the direction given in (13 L. D., 353) on June 10, 1891; that, notwithstanding this peremptory order of the Secretary to proceed with the adjustment of the grant under his directions of more than four years before, the Commissioner, on January 13, 1896, more than three months there-

after, instead of proceeding as directed, called upon the railroad company to show cause why the *suspension of* October last should not be removed, blandly remarking that it was a matter of importance to settlers and homestead applicants, and demanded immediate attention (Record, p. 97); that, although it was a matter "requiring immediate attention," nothing further was done until July 17, 1896, six months thereafter, when he held the selection for cancellation subject to appeal within 60 days; that the company after securing suspension from 1891 to 1896, a period of five years, acquiesced in the cancellation of its lists and declined to appeal; that not until October 23, 1896, were these admittedly illegal selections finally cancelled, and now he is met with the astounding proposition that they were never entirely cancelled, but that in the order of cancellation the original order of withdrawal, at least as to all the lands claimed by Ireland, including this land, was continued in force, and that as a consequence he never acquired even sufficient right to the land to question the title finally awarded to Ireland by the land department.

Such being the undisputed record facts, why, we ask, did not Gertgens become a *bona fide* homestead settler upon this land prior to the cancellation of the railroad selection, or the publication of notice by the Secretary, of the repeal of the statutory withdrawal, given by him May 22, 1891, just as Cunningham was held to be. We insist he did become such *bona fide* settler April 15, 1891,

and so continued thereafter, and as such acquired a vested right to the land.

Ireland Was Not a Bona Fide Purchaser.

Having established the proposition that Gertgens' settlement rights attached to the land April 15, 1891, the date of his settlement, and that his application to enter filed November 27, 1895, should have been allowed, we now proceed to a discussion of the question whether Ireland was a *bona fide* purchaser from the railroad company within the meaning of the 5th section, act of March 3, 1887. As heretofore stated, the trial court found for the defendant, plaintiff in error, on this point and excluded the evidence given by Ireland in the land department, in support of his application to purchase. But the Supreme Court of Minnesota took a different view and held that he brought himself within the terms of that statute.

Section 5, of the Act of March 3, 1887, under which Ireland was permitted to purchase the land, is as follows:

> "That where any said company have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from

the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

In his application to purchase 22,560.44 acres of land under the said 5th section (Record, p 16), Ireland based his right upon two contracts with the railroad company, one dated July 17, 1880, and the other March 30, 1883. A copy of the contract of July 17, 1880, may be found at page 19 of the Record, and is in words and figures as follows, to wit:

Contract of July 17, 1880.

"This agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Right Reverend John Ireland, of St. Paul, Minnesota, party of the second part, witnesseth: That the party of the first part in consideration of the premises hereinafter set forth has given and does hereby give to the party of the second part until the 31st day of December, 1881, the sole and exclusive right and authority to place settlers upon and of making sales or agreements of sale to parties desiring to settle upon or purchase the same all those tracts and parcels of land situate in the counties of Big Stone and Traverse in the State of Minnesota to which said party of the first part is or may be entitled by virtue of the land grants to said State for its benefit, of March 3, 1857, and March 3, 1865, which said lands are included within the indemnity limits so called of the land grant belonging to the main line of said company's railway in the counties above named, and which lands are particularly described in the schedule heretofore attached, it is understood by the parties hereto that the party of the first part has already selected and applied for said lands as inuring to is under said land grants and that such applications are now pending before the Department of the Interior and this agreement is entered into subject to the acquiring of said lands by the party of the first part of its said land grant. It is further agreed between the parties hereto, that said parties of the second part shall be at all the expense which may be required for

advertisements and pay of agents in making sales or agreements for sales of said lands and that the price for which said lands shall be contracted for or sold to purchasers shall not be less than four dollars per acre, payable upon the ordinary terms as to times and payments prescribed by said party of the first part in making sales of its other lands. It is further agreed that as soon as the party of the first part shall obtain title to said lands and be in position to enter contract therefor, that said party of the second part shall transfer to it all agreements of sale for said lands or any of them then in his hands, and that therefrom the land commissioner of said party of th first part shall enter into a proper agreement of sale in the name of the party of the first part with the purchaser or purchasers named in such agreements. It is further agreed by the said parties hereto that said party of the second part shall be allowed and paid by the party of the first part to compensate him for advertisements and other expenses incurred by him in making sales or agreements of sales above provided for as follows: In case he shall have disposed of and sold or given contracts of sale for two-thirds of the total amount of said lands in said schedule named on or before December 31, 1881, then he shall receive ten per centum of the gross amount realized from said sales by the party of the first part, which shall be paid to him from time to time as the same shall be paid unto the party of the first part, but in case the party of the second part shall have disposed of a less quantity than two-thirds of said lands on said December 31,

1881, then his commission on said sales shall be only eight per centum of the amount realized therefrom by party of the first part, payable as aforesaid. It being agreed that until December 31, 1881, only eight per centum of said receipts from said lands shall be paid to the party of the second part hereunder and the remaining two per centum in case of a sale or disposition of two-thirds of said lands as hereinbefore provided shall be paid to the party of the second part on said 31st day of December, 1881, payments of said eight per centum as it shall accrue under the terms of this agreement to be made to the party of the second part on the first days of January and July of the years 1880 and 1881, respectively. The party of the first part hereby reserves over and across all of said lands a strip at least one hundred and fifty feet in width for right of way, snow fences and other railroad purposes for the use of the St. Cloud and Lake Traverse Railway Company where the lines of said company's road are now located or shall be hereafter located across said lands or any of them. It is further understood between the parties that the first party shall promptly notify the second party as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from date of receiving any such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contracts in the usual form with the party of the first part and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold to him from this agreement.

In witness whereof the parties hereto have duly executed these presents, this 17th day of July, 1880.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY,
W. B. ANGUS, Vice-President,
JOHN IRELAND."

The Contract of March 30, 1883.

A copy of the contract bearing date March 30, 1883, may be found at page 22 of the Record, and is as follows, to wit:

"Whereas a certain agreement between the St. Paul, Minneapolis and Manitoba Railway Company, party of the first part, and the Rev. John Ireland, party of the second part, bearing date the 17th day of July, A. D. 1880, by which the party of the second part was given the sole and exclusive right to sell and locate settlers upon a certain lot of lands in the counties of Big Stone and Traverse, in the State of Minnesota, which lands are particularly described in said contract and among other provisions of said contract, it provides: That the party of the first part shall notify the party of the second part as often and as soon as it shall receive title to said lands or any of them, and said second party shall within sixty days from the date of such notice complete the sales of the lands named in such notice by having the purchasers thereof enter into contract in the usual form with the party of the first part, and a failure on the part of any purchaser to comply with this provision shall be considered as releasing the lands agreed to be sold by him

by this agreement. Now, therefore, the contract herein referred to having expired on the 31st day of December, 1881, and the railroad company not yet having acquired title to the lands in question, it is now agreed between the railroad company and the Rev. John Ireland that when title to these lands are acquired by the railroad company, and notice of same is given to Rev. John Ireland he shall have the privilege and right at any time within 60 days of date of said notice, of purchasing for himself or for such parties as he may designate (due regard being had as stated in supplement to said contract for settlers who may have obtained any claim upon such lands previous to the date of said contract) any or all of the lands included in said contract not to exceed the amount of 50,000 acres at uniform price of four dollars per acre, ten per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland according as the moneys are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate, the condition of sale usual with the company shall be observed, or at least the interest upon the purchase-money shall be paid from the date of purchase to the fifteenth day of December following, when the usual condition shall be enforced.

(Signed) JAMES B. POWER,
Land Commissioner
St. P., M. & M. Ry. Co.,
JOHN IRELAND.

OFFICE OF THE LAND DEPARTMENT,
St. P., M. & M. Ry., March 30, 1883."

As to the first contract, that of July 17, 1880, the land department held:

> "It is apparent upon the face of the instrument that the first agreement entered into between Ireland and the railway company merely constituted him an agent, and invested him with authority to locate settlers upon the lands embraced in the schedule attached thereto, and to make sales to said parties and to pledge and bind the railway company to make titles for said lands whenever it should obtain the title from the Government. * * * It follows that Ireland is not a purchaser within the meaning of the act." &c. (Record, pp. 44 and 45.)

But, as to the second contract, dated March 30, 1883, that department held that inasmuch as the contract gave Ireland the "right and privilege of purchasing for himself or for others, &c," after receipt of notice from the company that it had acquired title, he was a *bona fide* purchaser within the meaning of the act of March 3, 1887, notwithstanding the fact that the company never acquired title, never gave such notice, and he never did, nor could have exercised the conditional option given him, and NEVER PURCHASED AN ACRE OF THE LAND.

Analysis of the Contract of 1883.

It will be noted: The first and second paragraphs of the above contract simply recite the rights of

both Ireland and the company under the old contract of July 17, 1880, which had expired by the limitation contained in it.

The third and last paragraph, after reciting the *expiration* of the old contract, proceeds to set out the new arrangement between Ireland and the company as follows:

First. That *when* the company acquires title and gives Ireland notice of this fact, he shall have "*the privilege* and *right* of *purchasing* for *himself* or *for such parties* as *he* may designate," at any time within sixty days of date of said notice.

Second. The only description of the lands embraced in this "privilege and right of purchase" is, "Any or all of the lands included in said contract (the first, covering 66,527.01 acres) not to exceed 50,000 acres."

Third. The price agreed on was $4.00 per acre, ten per cent. of which sum was to be paid to Ireland out of moneys received by the company from purchases by himself, or by those he might designate.

Contract a Mere Option.

This contract is wholly *one-sided* and is known in law as a unilateral or option contract without consideration, and cannot be enforced by either party, in law or equity.

(1) The company gives Ireland the "privilege and right" of purchase, without requiring him to buy. He may take 50,000 acres, or 1,000 acres, or he may decline to take any whatever.

(2) The company requires no consideration for this privilege of purchase, and Ireland does not agree to pay any.

(3) The company exacts no penalty, forfeiture, or indemnity in case Ireland should decline to avail himself of the privilege of purchase.

(4) On Ireland's part, he agrees to nothing whatever. He does not agree to pay any consideration for the privilege or option of purchase—does not agree or bind himself to take an acre of the land, or pay any penalty, forfeiture, or damages in case he should not.

(5) There being no binding contract on the part of either party, to either sell or buy any part of the land, it is neither a purchase nor contract to purchase.

This agreement gave Ireland no "privilege or right" whatever as to the land embraced therein, until after he received notice from the company that it had acquired title to the land, and he did not agree to do anything then or thereafter.

Law of the Case.

Section 5 of the act, under which Ireland claims, expressly confines its relief and benefits to "*bona fide purchasers*" of railroad lands, hence such a

purchaser must show a *bona fide* conveyance from the company to entitle him to its provisions. The courts define such a conveyance or contract as follows:

> "When we speak of a *bona fide* contract, agreement, or covenant, we mean one that is legal, valid, subsisting; such a contract as imposes legal obligations, and may be enforced in the judicial tribunals of the country."
>
> Am. & Eng. Ency. (2d. ed.), p. 615, quoting from Hale *vs.* Darter, 10 Humph. (Tenn.), 95.

In the important case of Williamson *vs.* Berry, 8 How., 544, this court, speaking of special acts of the New York Legislature authorizing one Clark as trustee to sell property, held:

> "We now proceed to the other points certified. Upon the first of them, relating to the premises having been parted with by Clark to DeGrasse, upon a consideration other than cash, we remark that sale is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."

The above case is cited and approved in Hutchmaker *vs.* Harris, 38 Pa. St., 498.

In the well-considered case of Butler *vs.* Thompson (92 U. S., 2 Otto, 412), referring to the instrument in question in that case, the court said:

"As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds but that it is void upon common-law principles. * * *

Let us examine the argument. Blackstone's definition of a sale is 'A transmutation of property from one man to another in consideration of some price.' 2 Bl. 446. Kent's is 'A contract for the transfer of property from one person to another.' 2 Kent, 615. Bigelow, Ch. J., defines it in these words: 'Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor.' Gardner *vs.* Lane, 12 Allen, 39, 43. A learned author says: 'If any one of the ingredients be wanting there is no sale.' Atk. Sales, 5. Benj. Sales p. 1, n. and p. 2, says: 'To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised.'

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of agreement or meeting of minds by which a title passes from one and vests in another. A man cannot sell his chattel by a perfected sale and still remain its owner. There may be an offer to sell, subject to acceptance,

which would bind the party offering, and not the other party until acceptance."

After quoting these definitions the court says:

"Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale."

In Richardson *vs.* Hardwick, 106 U. S., 252, the court, in passing upon an unilateral or option contract, declares the law to be:

"The written contract gives him the privilege, or, as counsel call it, an 'option' to become equally interested in the land by paying one-half of the purchase-money, within two years after its date. The contract, of itself, did not vest him with any interest or estate in the land. It merely pointed out the mode in which he might acquire an interest, namely, by paying a certain sum of money within a certain time.

It is clear from the terms of the contract that Richardson (vendee) was not bound by it. He did not agree to purchase any share in the land or to pay Hardwick any money. The contract gave Hardwick (vendor) no cause of action against Richardson. The latter was not bound to become interested in the land, or to pay any money thereon, unless he chose to do so."

It is needless to say that the Supreme Court refused to decree specific performance of this contract in favor of the vendee.

See also—

Smith *vs.* Reynolds, 3 McCrary, 157.

In Dorsey *vs.* Packwood, 12 How., 126, the syllabus is as follows:

> "An agreement, whereby the purchaser of a plantation bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation, was deficient in mutuality. The son-in-law was not bound to render any services or pay any money. It was a *nude pact.* It was not an alternative obligation upon the son-in-law, because the election to pay his half out of the profits would be merely paying with another man's money."

In passing on the case the court declares:

> "But there is one characteristic necessary to give it validity as a binding contract in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey (son-in-law) whatever. He is not bound either to render services or pay money as a consideration for one-half of the land. Packwood could not support a suit upon it to compel Dorsey to do anything. It is not an alternative obligation because Dorsey is not bound to perform either alternative."

In Clark on Contracts, page 16, the author says:

> "Looking at contracts, then, in the light of a promise" we may say that there are three stages necessary to the making of that sort of agreement which results in a contract: (1) There must be an offer; (2) There must be

an acceptance of the offer, resulting in a promise; and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation."

See also—

Stitt *vs.* Huidekoper, 17 Wall., 385.

Johnson *vs.* Jacobs, 42 Minn., 168.

Harvey *vs.* Duffey, 99 Cal., 401; 33 Pac. Rep., 897.

Clark on Contracts, pp. 34–35, and cases cited.

Grant *vs* Buchanan, 46 Minn., 254.

Emerson *vs.* Graff, 29 Pa. St., 358.

Conkey *vs.* Peach, &c., Co., 16 C. C. App., 8.

Wenham *vs.* Switzer, 15 U. S. App., 302.

It is passing strange to us that the Supreme Court of Minnesota, in its decision sustaining the instrument in question as a valid contract of purchase, should have so entirely ignored its own decisions construing similar instruments. It is the more remarkable, too, since the attention of the court was specifically drawn to these cases in the brief filed on behalf of Gertgens in that court.

In the case of Bailey *vs.* Austrian, 19 Minn., 535, which was an action based upon an agreement between the plaintiffs, who were engaged in a general foundry business, to take from the defendants during a specified period, and the defendants promised to furnish all of the pig iron which the plaintiffs might want in their said business during the term mentioned at specified prices. In deciding the case the court said:

"If this state of facts establishes any contract, it is a contract of *mutual promises*—that is to say, the sole consideration for defendants' promise to supply is plaintiffs' promise to purchase, and *vice versa*.

The general rule (with exceptions not important in this instance) is, 'that a promise is not a good consideration for a promise, unless there is absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.' 1st Parsons on Contracts, 449, and note *z*.

Upon the foregoing state of facts the engagement of plaintiff was to purchase all of said pig iron which they might want in their said business during the time specified; but they did not engage to *want* any quantity whatever. They did not even engage to continue their business. If they saw fit to discontinue it on the very day on which the supposed agreeement was entered into, they were at entire liberty to do so at their own option, and, whatever might have been defendants' expectations, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to 'want,' and of course no absolute engagement to *purchase* any iron of defendants.

Without such absolute engagement on plaintiffs' part, there is no 'absolute mutuality of engagement,' so that defendant 'has the right at once to hold 'plaintiffs' to a positive agreement.'

The testimony excluded was properly excluded, since it did not tend to establish a valid contract on the part of defendant, and was therefore immaterial."

This entire lack of mutuality of engagement, shown in the above-mentioned case, likewise characterizes the agreement between Ireland and the railroad company in the case at bar. And although the Supreme Court of Minnesota very properly held there was no binding contract in that case, yet, without overruling it, or even attempting to distinguish it from the Ireland case, but ignoring it entirely, the court held the Ireland contract to be a valid contract to purchase. That there was no more mutuality of engagement in the Ireland case than in the Bailey case must be evident to any one who will take the trouble to *analyize* it.

Certainly it will not be contended that Ireland agreed to "want" a single acre of land described in the instrument entered into any more than Bailey did in the case cited above. Neither will it be contended that the railroad company "had the right at once to hold Ireland to any positive agreement."

This case of Bailey *vs.* Austrian, *supra*, has been approved and followed by the Supreme Court of Minnesota, among others, in the case of Stensgaard *vs.* Smith (43 Minn., 11).

Further considering the illegality and insufficiency of this mere option or privilege to purchase lands to confer upon Ireland any estate or interest, either legal or equitable, in the land, we beg to call attention to the following general authorities upon the subject.

The force and effect of such a contract is stated in 28 Am. & Eng. Ency. of L., p. 77, as follows:

"The right to purchase land is frequently the subject of contract, and such a right may be styled an option. It is not an estate in land, and an option contract is not a contract of sale."

In Warvell on Vendors, vol. 1, p. 187, under the head of "Option of Purchase," cited in the above authority, he says:

"The remarks of the foregoing paragraphs have reference, however, only to the bilateral contracts; for an agreement whereby the owner of land merely gives to a prospective vendee the right, option, or refusal to purchase at any time in the future, confers upon the party having such option no interest, either legal or equitable, in the land.

It is not a contract of sale within any definition of the term, and at best but gives to the option holder a right to purchase upon the terms and conditions, if any, specified in the agreement or proposal."

Thus we find in one of the latest Text Books on Vendors and Purchasers the established doctrine held by all the courts of this country and England that an option contract of purchase of lands neither conveys any interest or estate therein to the vendee nor is such a contract, in any sense, a contract of sale.

Bishop in his work on Contracts enlarged edition, sec. 321, thus succinctly states the rule:

"A mere offer or promise, not accepted, involves no concurrence of wills, and it can never constitute a contract.

Again, at sec. 78 the same author, says:

> "A common method of entering into this contract is for one person to make an offer to another; then, if the latter accepts it, the contract becomes thereby perfected. And unless both are bound, so that an action could be maintained by either against the other for a breach, neither will be bound."

See also—

Section 318, same volume and cases cited.
Smith on Contracts, sec. 154, quoting Pothier.
Wait's Action and Defences, vol. 1, p. 102.
Fisher *vs.* Seltzer 23 Penn. St., 308.
Ritenour *vs.* Mathews, 34 Indiana, 279.

Then if, as held by this court and other authorities cited above, Ireland's contract giving him the "privilege and right of purchase" conveyed to him no interest or estate in the land, nor was even a contract of sale of the land to him, he cannot be held to be a "*bona fide purchaser*" in any legal sense, for it would seem utterly impossible for him to be a purchaser of lands under a contract which gave him no sort of interest, in law or equity, in the lands claimed to have been purchased. Mary M. Bostwick *et al.*, 80 Ill., 138.

In the proceedings before the land department, Ireland, over the objection of protestant (Record, pp. 22 and 23), attempted to engraft upon the written agreement a different meaning than it bears upon its face and by its unambiguous terms, through oral conversations between himself and the

railway company's land commissioner, had antecedent to the execution of the instrument. This testimony was very properly ruled out by the trial court. (Record, pp. 71 and 72.)

The following is the testimony on this point:

"Q. Did you have a conversation with any official of said company in 1883, relative to the aforesaid agreement, and make a new arrangement with the company respecting said land? If so, describe the conversation as nearly as you can remember."

"A. In March, 1883, I had such conversation with James B. Power, land commissioner of the St. Paul, Minneapolis and Manitoba Railway Company. I said to him, 'My contract made a few years ago is now expired without the railroad having secured title so far. I have been to a very large expense inducing immigrants to settle on those lands. I now propose another agreement. I will buy myself a large quantity of those lands, and holding them as my own, deal directly with the settlers, putting on the lands any prices I may choose, for my own benefit.' Mr. Power answered, 'Very well.' I replied, 'I wish you to understand very well that I am buying those lands as my own, so that I may make as far as I think expedient, a profit out of them.' He said, 'The lands are yours. I hope you will make two hundred thousand dollars out of them.' He then began jotting down the nature and conditions of the contract."

"Q. Was the conclusion reached by reason of that contract subsequently reduced to writing in the form of an agreement or contract; if so, how was that contract executed?"

"A. It was so reduced in writing, the contract was executed in duplicate by Mr. Power and myself, he retaining one copy, and I the other."

Said Ireland then introduced in evidence, and had filed as the contract referred to by him in his testimony, an instrument in writing dated March 30, 1883.

The written agreement will be examined in vain for any such language, terms, or conditions as stated in this alleged conversation.

That it was incompetent for him by such prior conversation to vary or modify the terms of this unambiguous written instrument, is abundantly settled.

Willard *vs.* Taloe, 8 Wall., 557.
Ins. Co. *vs.* Mowry, 96 U. S., 544.
Stitt *vs.* Huidekoper, 17 Wall., 385.

Where, as in the case at bar, there is no uncertainty, it is conclusively presumed that their whole agreement and the manner and extent of their undertaking were included in the writing.

McKinley *vs.* Williams, 20 C. C., 312.
Bell *vs.* Mendenhall, *et al.*, 80, N. W. Rep., 843 (Minn.).
DeWitt *vs.* Berry, 134 U. S., 306.
Seitz *vs.* Brewers' Refrigerating M. Co., 141 U. S., 510.

Equally and for the same reason was it incompetent for Ireland to attempt to make out of the contract something other than it bore on its face by having the witness Stoddard testify that it was a "general understanding among employes of said company" that said lands were "Ireland's lands." This testimony was also properly rejected by the trial court (Record, p. 78). Not only was it a mere declaration of unknown persons and strangers to the contract and hence not binding on the railway company, but, even if made by the proper officials of the company, it could not affect the character of the instrument, for, "an erroneous construction of it by them (the parties) will not control its effect."

Railroad Co. *vs.* Trimble, 10 Wall., 367.

Bailey *vs.* Hannibal & St. John R. R. Co., 17 Wall., 96.

Bast *vs.* First National Bank of Ashland, 101 U. S., 93.

But Ireland's subsequent conduct, as shown by his own evidence, proves conclusively that he understood the agreement according to the tenor of the written instrument:

On the 28th day of March, 1889, the company notified Ireland that it had obtained title to 26,000 acres of the lands embraced in his contract and "requested him to make what selection he wished." He admits that he selected but 16,000 of the 26,000 acres. (Record, p. 25.)

Again, he also put in evidence a contract he had made with one Tyler on the 30th day of December,

1889, as to some of these lands, in which occur the following:

> "The said Ireland has a right at *his own choice* to select the lands he *wishes to purchase* definitely from the said railway company, and those not chosen are no longer to be covered by the present contract between the said Ireland and the said Tyler." (Record, p. 30.)

Here, then, more than five years after the date of this contract, we have the interpretation Ireland himself put upon his agreement with the railway company. It proves conclusively, just what we contend, that it was a mere naked option and that he was in no way bound to take any part of the land. That, to use his own language in the Tyler contract, he had a right to "his own choice" as to lands he might wish to purchase. Moreover, it is just such an agreement as the parties intended to make. The company was not concerned as to whether sales were made to Ireland or to others, as it was to pay Ireland ten per cent. of the receipts for his services in making sales, whether made to himself or to others. And Ireland did not want to be bound to take any of the lands which he could not sell. All he wished was just what he bargained for, viz., the *privilege* of purchasing at ten per cent. on the amount received, in which case, if he made no sales he received nothing, but he ran no risk and incurred no liability, since he could not be compelled to either sell or purchase any part of the lands. It was a mere speculative venture. If he could make sales of any of the lands for more

than $4.00 per acre, he wanted not only his ten per cent. from the company, but any amount which he could get over and above that sum. In such case, he wanted to have the right to purchase them himself and convey to the parties to whom he sold; if he could sell for but $4.00, he got his ten per cent., and the company would convey directly to the purchaser.

Part Performance and Past Consideration.

In the Land Department, speaking of the consideration for Ireland's contract, the Commissioner in his decision awarding Ireland the land, said:

> "Even admitting protestant's contention that there must be shown some consideration rendered by Ireland in order to constitute him a purchaser in good faith, there is sufficient proof to meet this requirement.
>
> We look to the evidence again and find Ireland to testify that the consideration was the labor he had given and was giving to bring settlers along the line of the road and the large expenditures which he had made and was making for the same purpose." (Record, p. 49.)

Now, suppose it be true that Ireland, after his last contract of 1883 was executed, proceeded to look up purchasers for these lands, and incurred expense and labor in so doing, surely no lawyer would contend that such acts and expenditures can be held part performance of the contract which requires no such things to be done. They were

entirely voluntary on Ireland's part, because the contract does not contemplate them as part of its provisions to be performed by Ireland.

Ireland could not prove any consideration as in compliance with the terms of the instrument other than as was expressly required therein.

Custian *vs.* St. L., &c. Co., 60 N. W. Rep., 425 (Wis.)

Besides being outside of the contract, it is perfectly evident that Ireland's efforts to sell these lands at a price in advance of what he was to pay the company for them, was a matter of pure speculation for his own benefit in realizing profits, and in no sense for the special benefit of the company.

In Gorden *vs.* Darnell, *supra*, the Supreme Court of Colorado enters into a very full discussion of the question whether such voluntary services can be considered an election or part performance.

In that case a bond conditioned to convey a mining claim upon payment of a certain sum within a given time containing no clause giving obligee possession during option, and having no consideration expressed for the option given, was passed on by the court, as follows:

> "A bond of this nature is, in the first instance, a mere option to the obligee, to purchase at any time within the period therein limited, upon simple compliance with the terms stated. Until such acceptance by the obligee, there being neither mutuality nor consideration, it imposes no obligation whatever on either

party, and for that reason is subject to revocation by the maker at any time prior to acceptance. Such a bond lacks the element of a valid and binding contract. * * * Not being enforceable to any degree against the purchaser, he is equally incapable of enforcing it against the seller, for contracts to be obligatory upon either party must be mutual. Until acceptance by the obligee or performance of some act equivalent to an election to purchase under the terms mentioned therein, it is *nudum pactum*. * * * Such acceptance, together with a tender of performance, renders the remedy mutual and entitles the purchaser to a specific performance. The minds of the contracting parties are said to meet upon the happening of these events, and the offer to sell ripens into a valid contract, just as it would if made and concluded at the time of acceptance."

It being contended by the defendants in that case that they went into possession at about the time of the contract, expended money in improvements—all with knowledge and without objection of plaintiffs, who stood by and allowed this to be done and allowed obligee to make a contract of sale, to a third party, the court said:

"If these facts be admitted, they do not render the bond irrevocable, unless it can be said that they amount to an election to purchase and are in compliance with the terms of the contract. Nor can it be considered equivalent to an election to purchase the mine, so far as the written contract is concerned, for that prescribed a different mode of election, viz., the payment or deposit of the purchase-money;

and it is equally difficult to comprehend how taking possession and making improvements can be considered as performence in this case, at least under the written obligation in evidence, since none of its provisions contemplate such act."

The doing of things which the promisee does for himself is not consideration for an offer by the promisor.

Bisham *vs.* Therasson, 30 Atl. Rep., 969 (N. J. Ch.).

Of course it is admitted Ireland never either entered upon or made any improvements upon the land in controversy herein, but that they were settled and improved by the defendant.

The option being without consideration for its making and not having been accepted by Ireland in compliance with its terms, is a *nude pact.*

Provident, &c., Co. *vs.* Mills, 91 Fed., 435.
Weaver *vs.* Burr, 8 S. E., Rep., 743, 31 N. W., 736.
Fliason *vs.* Henshaw, 4 Wheat., 225.
Wilkerson *vs.* Havenbach, 58 Mich., 574, and
Sayer *vs.* Mead, 33 N. W., 355.

Right of Option Contingent.

The agreement of March 30, 1883, constituted, as we have shown, a unilateral option. But it did not even give Ireland an absolute, unconditional option. His right thereto was dependent on a

contingency over which he had no control, which neither did nor can happen, to-wit, the acquirement of title by the railway company. The instrument gave Ireland no "privilege or right" to purchase, make sales, or do *anything else* touching the lands until after he received notice from the company that it had acquired title. No present right whatever was given him. He had no more right to deal with these lands than the merest stranger, until the contingency arose upon which his right of option depended. That no present purchase was provided for, or contemplated by the parties, is conclusively shown by the statement that there shall be paid to Ireland according as the moneys are received by the company, "*when* such lands *shall be purchased* by Rev. John Ireland or those he may designate," &c.

This option agreement is clearly distinguishable from one in which there is a conditional contract of sale with possession given thereunder to become absolute upon the happening of a contingency.

In the latter case there is nothing further to be done by either party except to await the event upon the happening of which the contract *eo instanti* becomes absolute from the date of its execution. Such a contract is irrevocable by either party and its consummation is not dependent upon the will of either, as the minds of both parties met at the making thereof. But, not so in the case at bar. Their minds never met nor could meet, by the very clear and explicit terms of the agreement, until the happening of the contingency. Even

then, whether any contract of purchase whatever would be made, depended wholly upon the will of Ireland. His mere silence, when he received notice from the company that it had acquired title, would have caused his option to lapse, or he might have selected one acre and let it lapse as to all the balance. There being no agreement on Ireland's part to take an acre of the land, it follows that the railway company could not have controlled his will, even though the contingency had happened; and as the contingency never happened no contract of purchase was either made or initiated. Where neither party could force the other to perfect a sale, there could certainly be no grounds for claiming a sale had been made absolute or conditional, legal or equitable.

> Bishop on Contracts, enlarged edition, section 78, and cases cited.

Again, before the option in the case at bar could become a contract binding on either party, it would have been necessary for Ireland to have complied with its terms by not only selecting the specific lands he would take out of the 50,000 acres and notify the company thereof, but also by paying or tendering the amount stated in the option, to wit, $4 per acre.

> Coleman *vs.* Applicant, 68 Med., 21.
> Dickinson *vs.* Dodds, 2 Chan. Div., 463.
> Potts *vs.* Whitehead, 5 C. E. Green, 55.

77

No Consideration.

The instrument in controversy is not only a mere conditional option agreement, without mutuality, giving Ireland no estate or interest in the land whatever, simply pointing out the method by which, in the event of the happening of the contingency, he may or may not, according to his own personal will, acquire a right to some part or all of the land; but it is without any consideration whatever, and hence vitally defective on that account.

However much it may be insisted the act of March 3, 1887, is remedial in character and requires a liberal construction, it will hardly be contended that a simple executory agreement to purchase land from a railroad company not based upon a valuable consideration, would support an application to purchase under its provisions.

The authorities on this point are numerous and uniform, and although, we hardly think it necessary, we will call attention to the following:

Bishop on Contracts, enlarged edition, at section 35, says:

> "The consideration is a prime element in every contract."

And in section 40 he lays down the correct doctrine thus:

> "It is, therefore, the rule of our law prevailing, both in courts of law and in those also of equity, that no executory, simple contract is valid without consideration."

Again, in section 77, still further pursuing the same subject, he says:

> "A promise by one, with nothing in return is void; as, if he undertakes in writing to convey land to another who neither agrees to buy nor pays anything for the promise."

This illustration of a void contract by the learned author is precisely in point in the case at bar; if it had been based upon the facts in this case, it could not have been more so.

Comyan on Contracts, at page 9, thus comprehensively states the law:

> "A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other is *totally void in law;* and a man cannot be compelled to perform it."

Chitty on Contracts, p. 6, says:

> "In the case of a contract not under seal, a consideration is absolutely necessary to give it validity."

Again, at p. 24, he says:

> "Consideration essential in law and equity in all contracts not under seal."

Travis on Sales, p. 1, quotes Blackstone's definition of a sale as follows:

"Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a *quid pro quo.*"

Hughes on Contracts (1902), section 35, says:

"An executory simple contract is a mutual agreement; between competent parties, touching a lawful subject-matter, for a valuable consideration, expressed with certainty and satisfying the statute of frauds.

An analysis of this definition shows that it possesses four essential elements, to wit:

1. A mutual agreement.
2. Between competent parties.
3. Touching a lawful subject-matter.
4. For a valuable consideration.

If one or more of these four essential elements is wanting, *there is no contract.*"

See also Wait's Actions and Defences, vol. 1, pp. 90 and 92.

Even the land department recognized the necessity for a consideration to support the contract, and sought to find it in the oral testimony of Ireland as to labor which he had given and was giving to bringing settlers along the line of the road and his expenditures for that purpose. Of course it is admitted that no consideration appears in the contract itself.

This court has settled the question as to the necessity for a valuable consideration to support such a contract of purchase of land from a railway

company, as would entitle the purchaser to relief under the provisions of the act of March 3, 1887.

In the case of the United States *vs.* Winona and St. Peter R. R. Co. (165 U. S., 463), the court in its syllabus holds that in order to bring one within the terms of the act he must have "purchased in good faith, and paid value for the lands."

In its opinion, at page 481, the court, speaking of the said act of 1887 and of the act of 1896 confirming the right and title of *bona fide* purchasers, said:

> "We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two Houses to whom bills were referred as confirmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from the railroad company of lands certified or patented to or for its benefit, providing that he purchased in good faith, paid value for the lands, and providing also that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

And at page 480 of said opinion the court, speaking of the 4th section of said act of 1887, wherein the word "purchaser" was used, said:

> "It does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent."

Neither by the courts nor the land department has any looser construction been placed on the words of the act. In all cases in which they have been passed on there has been either an absolute sale or contract to sell such as could have been enforced by either the vendor or the vendee in an action for specific performance. The fact that in some cases there was an agreement accompanied by posession to the vendee and the consideration paid either in cash or its equivalent by improvements and cultivation of the land does not remove the words of the statute out of the foregoing rule. For such agreements even though oral upon such consideration and possession, inconformity with the terms of the contract, have always been held binding and enforcible.

Antecedent Consideration Insufficient.

In the decision in the land department, as well as in that of the Supreme Court of Minnesota, it is at least intimated that Ireland's alleged expenditures in bringing settlers on the land prior to his contract of 1883, should be held to be consideration for said contract. Before referring to the authorities controverting this proposition, we call the attention of the court to the fact that Ireland was

an agent of the company under his first contract, and was to receive for his services a per cent. commission on the gross receipts of moneys from lands Ireland might dispose of as such agent, but his commission depended on the company's acquiring title to the lands and upon its getting $4.00 per acre for the same.

As stated in the second contract, the old contract expired by limitation December 31, 1881, the company not having received title to the lands.

Can it be said that the company owed Ireland one cent under this old contract for "services previously rendered" as claimed?

As stated in the first contract, his commission depended entirely upon the company's acquiring title to the lands, he may have contracted to purchasers, as well as upon receiving the purchase price, which it never did.

But suppose for the sake of argument it be admitted that the company did owe Ireland for his services rendered prior to the date of the second contract. Will any lawyer contend that what the company owed Ireland under the first contract, and which he had already earned, could furnish a valid consideration for the new contract?

If the company owed Ireland anything under the old contract, no promise by the company to pay this old debt could support a new undertaking.

It must be borne in mind that in the option of 1883 there is no provision that Ireland shall settle the land as consideration for the option or other-

wise, but only that he shall have the right to purchase the same on the payment of $4.00 per acre.

We call attention to authorities cited on this point in 3 Am. & Eng. Ency., 838:

> "The consideration must consist of a present or future act; a past act cannot serve as a consideration for a promise."

In 2 Am. & Eng. Ency., 444, under *bona fide* purchaser, the authorities hold:

> "A *bona fide* purchaser must have received his purchase upon some new consideration, or must have relinquished some security for a pre-existing debt due him."

Warvell on Vendors, in note to section 11, page 612, cites as holding that an *antecedent debt is not sufficient to support a contract* the cases of—

Wood *vs.* Chapin, 13 N. Y., 509.
Cummings *vs.* Boyd, 83 Penn. St., 372.
Moon *vs.* Ryder, 65 N. Y., 441.
Clark *vs.* Flint, 22 Pick. (Mass., 243).
Menges *vs.* Condit, 23 N. J. Eq., 315.
Hinds *vs.* Pugh, 48 Miss., 276.

Ireland attempts to sustain his alleged purchase from the company by pleading an old debt or claim for services rendered under an expired contract, said to be due him from the company.

Under the above definitions of legal consideration and *bona fide* purchaser, it will be seen that the courts universally hold that Ireland's claim of an antecedent debt due him by the company furnishes

no consideration for the new contract, but does furnish the very reason and ground upon which such contracts are held invalid.

"Past services rendered" by Ireland to the company cannot therefore sustain the cantract of 1883, which fails to state any consideration whatever on its face.

Neither, as pointed out in the above definitions of a *bona fide* purchaser, did he relinquish some security for a pre-existing debt due him from the company, but, on the other hand, actually relies on a "pre-existing debt" due him from the company as consideration for his contract.

The alleged contracts of sale made by him, about which Ireland testified, but which testimony was ruled out by the trial court, in legal effect, were made subject to his option and in nowise change or characterize the same. They created no equities in favor of Ireland. But it is unnecessary to present reasons for its exclusion, as this court cannot upon any theory, and will not, consider such testimony or its admissibility.

At no angle from which the case can be viewed does there appear to be any law or equity in favor of either Ireland, or O'Connor, the defendant in error.

O'Connor, who is Ireland's private secretary, is the legal owner of seven thousand acres of said indemnity land, embracing the land in controversy, all of which he received through a trustee of Ireland under a contract from the latter (Record,

p. 108) without ever having been in possession of any part thereof.

In the hearing in the land department, Ireland introduced O'Connor as his witness to testify as to these sales. His testimony may be found at pages 78 to 82, both inclusive, of the Record. On cross-examination, in speaking of the contracts which he held, including one for the land in controversy, he testified as follows:

> "Q. Was there a form used expressly for the land you bought of the bishop?
>
> "A. There was some printed forms, some which we ordinarily bought from supply houses; the writing on those forms, filling out of those forms varied under certain conditions.
>
> "Q. Would you be willing to furnish a sample copy of the form in question to be placed in evidence in this court?
>
> "A. I would not wish to do anything that might jeopardize my claim without consulting my own attorney.
>
> "Q Then you decline to allow the sample copy to be used in this case, do you?
>
> "A. I hold all my papers, protect my own claims, and will not produce them until necessary.
>
> "Q. In other words, until you have to?
>
> "A. I decline to answer.
>
> * * * * * *
>
> "Q. Were those contracts which were issued to the bishop's secretary, yourself, peculiar to themselves?
>
> "A. I think I shall decline to answer any question relating to John P. O'Connor personally in relation to his purchase, for the reason

that my attorneys are not here to protect me in any rights I may have and which I think I have.

"Q. Then any question that may be asked you with reference to the seven thousand acres or more of land which you have bought from the bishop you decline to answer?

"A. I decline to answer, for the reason that I fear I may jeopardize my claim, as stated before, without consultation with my attorneys.

"Q. You mean by that that you would like to consult your attorneys as to what your answers should be?

"A. I mean just what I said."

We forbear comment upon this testimony, but merely add that O'Connor might have placed himself in a more favorable light by such candor and frankness as the gravity of the matters at issue demanded, rather than by the flippancy and apparent evasion shown by him.

The Cases in the Land Department.

The Supreme Court of Minnesota, in its opinion in the case at bar, undertook to show that in certain cases decided in the land department agreements similar in character to that of Ireland had been sustained and the parties held to be *bona fide* purchasers under the act of March 3, 1887. We insist that each of the cases cited by the court is clearly distinguishable from the Ireland case.

The material facts in the case of S. L. Campbell (12 L. D., 247), cited by the court as aforesaid, were:

> "March 1879, the railway company issued a circular executed by it stating 'in order that the settlement of these lands may not be delayed the company will issue permits to parties desiring to enter upon them and commencing improvements. These permits will entitle the parties to the lands from the company on the terms herein proposed, on its securing title thereto, on condition that they shall in good faith commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least 40 per cent. of the lands taken, and that they shall within 60 days after receiving notice from the land commisioner of the company that the company has secured title to and is ready to make a formal contract or deed of the lands, make such payments as may then be due on the lands and execute contracts or notes and mortgages to secure the deferred payments as hereinafter provided. * * * To secure the immediate settlement and cultivation of the lands, the company offers them on the following easy terms: payments will as a rule be required at the rate of one dollar per acre per annum, with interest on the deferred payments at the rate of 7 per centum, payable annually.
>
> It was further provided therein that the first payment of principal and interest would be due one year thereafter, but that no payment thereof would be required until the company was able to convey the lands by warranty deeds; and that special credits should be given the purchaser in the gross amount of

> $3.00 per acre for breaking and seeding the land, such credits to be applied 'on the first payments due on the lands, principal and interest.'"

Thereafter Campbell applied for a section of land, and on May 2, 1879, a permit attached to said circular was duly signed and executed by him and said railway company providing, among other things:

> "Mr. S. L. Campbell having applied for this permit (as appears by his signature hereto) the Southern Minnesota Railway Extension Company hereby authorizes him to enter upon and improve the whole of section No. 1, of Township 102, of Range No. 32, in Martin county, Minnesota, in accordance with and subject to the terms and conditions of the foregoing circular, which is hereby made a part of this permit. The price fixed upon the tract herein is seven dollars per acre. In case of compliance with the terms of this permit and of said circular, and in case the said company obtain title to said land the same will be conveyed to S. L. Campbell by warranty deed. It was then provided that in case the failure of Campbell to comply with the same such instrument should be considered as a lease entitling the company to take possession of the land and improvements thereon, as for unlawful detention after expiration of lease, and giving to said Campbell only permission to remove growing crops thereon."

Campbell thereupon duly entered into possession of the lands, cultivated and improved them, fully

complying with the terms of the contract, as found by the Secretary in his decision (12 L. D., 249), as follows:

> "Entered into possession of same, placed buildings thereon, and caused breaking to be done. The improvements made by him on the section are estimated to be worth $4,000.
>
> It clearly appears from an examination of his contract with the railway company that the same was a *bona fide* transaction, wherein he agreed to pay for said lands at the rate of seven dollars per acre, he to receive a rebate of three dollars per acre, for each acre of the land he should cause to be cultivated within a certain time."

It will be observed that all of the essential elements of a valid contract were present in the Campbell case. There was immediate possession taken pursuant to the contract, prompt cultivation and improvement of the land at large cost, and strict compliance otherwise with the conditions precedent stipulated in his contract. Here are found mutuality of obligations between him and the company and strict compliance on Campbell's part. There can be no question but that this contract could have been enforced by Campbell if the company had acquired title.

For a full discussion of this class of cases under option contract, we call attention to the case of Gorden *vs.* Darnell, 5 Colorado, 302, where all the authorities are collected and cited. The court say:

> "Where a money consideration for the option is *expressed* or where the bond to convey requires the purchaser to develop and improve the property as a consideration for the option, or in part performance for the conditions of the sale, and these terms have been duly complied with, a totally different case is presented from that where, by the terms and conditions of the instrument, nothing is to be paid and nothing done under it by the purchaser, until he makes his election to purchase.
>
> The former case contains all the elements of a binding contract, and the purchaser, although free to reject the offer of sale, may elect to accept within the time limited."

The court cites numerous cases from Massachusetts, Pennsylvania, Illinois, California, and from Fry on Specificic, Performance, section 64, 166, 167, 177, and 179.

The Supreme Court of Minnesota in commenting upon this case said "as to Campbell the contract was nothing but a permit to occupy and an option to buy. The only real distinction between that case and the one at bar is that Campbell personally entered upon the land covered by the agreement, occupied the same and made valuable improvements."

This statement, though not complete, makes a very broad distinction between the two cases. And when it is considered that the railroad circular, which was made a part of the contract promised a deed to the land provided he took immediate

possession and should "in good faith commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least 40 per cent. of the lands taken," &c. All of which conditions were strictly complied with by Campbell it makes a very different case indeed. There was possession, improvements, and payment of part of the purchase-money by the breaking of the land for which he was to be allowed $3.00 per acre. It will be remembered Campbell's contract was for the whole section and the railway company did acquire title to a portion of it and conveyed the same to Campbell, thereby executing the contract in part, but in so doing Campbell was not credited for any portion of his improvements to the amount of $4,000, made on the other portion of the land. As before stated, as soon as Campbell entered on the land and made improvements provided for by the contract they constituted payment *pro tanto*, and this was not only of itself an acceptance of the offer of the railway company, but, under the express wording of the circular, required such purchaser to execute contracts or notes and mortgages to secure deferred payments.

As to the contract of Austin *vs.* Leuy (21 L. D., 507), also referred to by the Supreme Court of Minnesota, it will be found that Austin was in possession of the tract as a home for twenty years, had made $3,000 improvement thereon, as well as cultivating the land for a number of years.

The Secretary's decision quotes numerous written promises or agreements by the company to convey

the land to her when it acquired title, and his decision also points out that she had paid the company the agreed price and consideration for the land.

An examination of the Secretary's decision in that case will show that the Supreme Court of Minnesota was greatly in error in its intimation that there was no written agreement, and that the Secretary held "it was immaterial as to how the contract was evidenced."

Both of these contracts fall clearly within the definition of valid option contracts under the decision of the Colorado court, *supra*. In that decision the court distinguishes between option contracts wherein the vendee is required by the contract to perform, and does perform, acts or labor for the improvement or development of the land contracted for, and those contracts wherein the vendee or purchaser is not required to perform any such conditions before the time appointed for him to elect.

In the former, the performance by the vendee of conditions as to improvements, &c., before election constitutes a part performance which makes the contract valid and enforcible in the courts. The other class, where no consideration is expressed in the contract, and no requirement of a performance of such conditions prior to election is made, are held by the court to be non-mutual *nudum pactum*, and not enforcible in law or equity.

By this rule of construction held by the courts both Campbell's and Austin's contracts were valid

and enforcible in the courts, while on the other hand, Ireland's contract utterly failed to be a contract to purchase. There is no consideration expressed, no act or condition on his part to be performed, required; and under the terms of the contract, he was to pay nothing for his privilege of option or purchase, neither was he required to do anything under the contract prior to the date of election he might make, when notified to do so by the company. In other words, he was neither to pay anything nor do anything for the privilege of election.

In the case of Granden *vs.* LaBar (23 L. D., 301), also referred to by the Supreme Court of Minnesota, that court in its discussion of the holding of the Secretary quotes the following part of said decision.

> "It is charged that the stock had no market value, but the fact, if true, does not affect the question of consideration."

The court singularly omits to say that the Secretary also said:

> "Its principal and immediate value (that is the preferred stock of the railroad company) as it seems to me, arose out of the fact that it was convertible into the lands of the company (at the rate of $3.00 in stock for an acre of land), situated within certain prescribed limits. Those lands were in an unsettled country, but they had some present and much prospective value, and that value whatever it was, inherred in the stock that was convertible into them."

It is thus seen that the Secretary not only recognized the fact that a valuable consideration was essential to support Granden's contract to purchase, but that the $3.00 of the preferred stock of the railroad company which they paid for each acre of the land purchased by them had "some present and much prospective value," and hence their purchase was valid and they were entitled to the remedies provided by section 5, of the act of March 3, 1887.

Whether Ireland had any Contract, or was a Bona Fide Purchaser, are Questions of Law.

After discussing at length the proper construction of section 5, of the act of March 3, 1887, and holding that under such law, as construed by it and applied to the undisputed facts, Ireland was a "purchaser" of the land in controversy, the Supreme Court of Minnesota holds that such questions so argued by it are not of law, but of fact, and hence, not reviewable by the courts.

If the construction of a legislative act and of its applicability to undisputed facts are not of law, pure and simple, then would one be hardly conceivable.

The question whether the paper upon which Ireland was permitted to purchase was a contract of purchase, within the meaning of the act, is also a question of law, pure and simple.

> "The validity of a contract is a question of law. Whether a contract is void because

against public policy, for being made on Sunday, in violation of statute, or *for want of consideration*, are questions of law."

Culver *vs.* Banning, 19 Minn., 303.
Fowler *vs.* Scully, 72 Pa. St., 456.
Pierce *vs.* Randolph, 12 Texas, 200.
Heller *vs.* Crawford, 37 Ind., 279.

"The construction of written instruments, their signification and legal effect, are matters of law for the court."

Brown *vs.* Huger, 62 U. S. (21 How.), 305.
Estes *vs.* Boothe, 20 Ark, 583.
Richmond, &c., Co., *vs.* Farquar, 8 Blackford, 89.
Borill *vs.* Pimm, 36 Eng. L. & Eq., 441.
Holmes *vs.* Crane, 6 Ala., 570.
Kidd *vs.* Cromwell, 17 Ala., 648.
Rogers *vs.* Carey, 47 Mo., 235.
Woodman *vs.* Chestley, 39 Me., 45.
Bank *vs.* Inloes, 7 Md., 380.
Carpentier *vs.* Thiston, 24 Calf., 268.
Shepherd *vs.* White, 11 Texas, 346.
Addington *vs.* Etheridge, 12 Gratt., 436.
Cox *vs.* Freedley, 33 Pa. St., 124.

Wells on Questions of Law and Fact, sec. 46, thus states the rule:

"The general principal is well settled to be that the construction of the terms of an instrument is matter of law for the court. * * * Also the legal effect of an instrument."

"What is the meaning, validity, and effect of a contract are conclusions of law."

Latham *vs.* Westervelt, 26 Barb., 256.
Chapin *vs.* Potter, 1st Hilton, 366, cited in note, p. 9, Ramm on Facts.

"The construction of agreements for the sale of land is a matter of law for the court."

Am. and Eng. Ency. of L., vol. 28, p. 101.

The same authority, vol. 21, p. 518, thus states the rule:

"The general rule is well settled that the construction or interpretation of all written instruments belongs to the court alone." Attention is also called to the authorities cited in note 1 in support of the text.

If, then, "the validity of the contract" for "want of consideration," as well as the construction of its terms "and its signification and legal effect," are questions of law for the court, it is impossible for us to conceive of any rule of law which would make the decision of the land department upon these questions ones of fact, and therefore conclusive.

In the case at bar, we insist Ireland had no contract whatever. That the paper upon which he based his claim, and upon which he was permitted to purchase, lacked the essential elements of a contract. That it fell short of being a contract for the following reasons:

1st. It is a mere unaccepted option based upon a contingency which never happened, and hence it never ripened into a contract of purchase.

2d. It is not a contract for want of mutuality. The minds of the parties never met as to the purchase of the tract in controversy.

3d. If in all other respects regular and valid it is void for want of consideration, is a mere *nude pact*.

These are purely questions of law, and must be decided before it is at all necessary to consider whether his pretended purchase was made *in good faith* or not; for, if he had no valid contract, then he is not a purchaser at all and was not lawfully entitled to purchase the land.

He must stand or fall as his contract may be held to be valid and sufficient or the contrary. That alone constitutes his case. If he had no contract, he has no case. We have fully discussed these propositions in other parts of this brief and need not repeat the argument here.

In the Cyclopedia of Law and Procedure, vol. 5, p. 719, a *bona fide* purchaser is thus defined:

> "One who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without

notice," &c. Citing 1 Perry on Trusts, sec. 239 (quoted in Woolridge *vs.* Thiele, 55 Ark., 45, 17 S. W., 340; Fargason *vs.* Edrington, 49 Ack., 207, 4 S. W., 763, and Alden *vs.* Trubee, 44 Conn., 455).

Pomeroy's Equity Jurisprudence, sec. 745, thus defines such purchaser:

> "The essential elements which constitute a *bona fide* purchaser are therefore three: a valuable consideration, the absence of notice, and presence of good faith."

Ramm on Facts, in note to page 9, cites White *vs.* Brown, 14 How., Prac. Rep., 282, as holding question of "*bona fide* holder and owner" as one of law.

In the case at bar all the evidence as to Ireland's alleged purchase is undisputed. No variant inferences of fact can be drawn therefrom. Under the evidence he is either a purchaser or not, according as the law shall be construed. If there were a controversy as to Ireland's citizenship or as to his having any paper writing, or as to any other essential fact leading up to his alleged purchase, the finding of the land department would be conclusive thereon.

But whether all the facts as to the alleged purchase, being uncontroverted, make him a "purchaser" within the meaning of the act is purely a question of law.

It is the settled law of this court that where the land officials err in construction of the law or in

application of the law to the undisputed facts, their action is reviewable by the courts.

Moore *vs.* Robbins, 96 U. S., 530, 535.
Johnson *vs.* Fowsley, 13 Wall., 72.
Sanford *vs.* Sanford, 139 U. S., 642.
Silver *vs.* Ladd, 7 Wall., 219.

In the case of Moore *vs.* Robbins, *supra*, the court, speaking through Mr. Justice Miller, held:

> "The Supreme Court of Illinois, in their opinion of this case, come to the conclusion that this final decision of the Secretary is not only conclusive on the Department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.
>
> The whole question, however, has been since that time very fully reviewed and considered by this court in Johnson *vs.* Towsley, 13 Wall., 72 (80 U. S., 485). The doctrine announced in that case and repeated in several cases since is this:
>
> That the decision of the officers of the land department, made within the scope of their authority on questions of this kind is, in general, conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and imposi-

tions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

Again in Sanford *vs.* Sanford, *supra*, the court, through Mr. Justice Field, said:

> "But where the matters determined are not properly before the department or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necesarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. Quinby *vs.* Conlan, 104 U. S., 420, 426; Baldwin *vs.* Stark, 107 U. S., 463, 465. In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from a misconstruction of the law or the machinations of fraud."

The authorities cited by the Minnesota Supreme Court in its decision herein show no deviation from the principles as above enunciated.

The case of Bishop *vs.* Hyde (66 Minn., 24) was taken by writ of error to this court and its decision is reported in 177 U. S., 281. The controverted question of fact before the land department was whether the applicant had made a contract to

divide the land with others; and the Minnesota Supreme Court held that there was evidence to sustain the finding of the land department on that point. In affirming that decision this court, speaking through Mr. Justice Miller, said:

> "No one can read the testimony which was offered before the land officers without perceiving that there was sufficient in it to justify a finding that the applicant had made a contract in direct violation of the statutory provisions. It is true he himself testified that he was to secure Mr. White "on a one-half interest," but the contract itself was not produced, having in some way disappeared, and Mr. McDonald, who was a party to it (for it was a joint contract between White, the applicant, and McDonald) testified that he was to have half of the land. We do not stop to inquire whether an agreement to give a mortgage for money advanced comes within the letter or spirit of the statute, for there was enough in testimony to justify the conclusion of the department that it was a contract to divide the land when obtained, and it is not the province of the courts to review such finding of fact."

Assuming in that case there had been no evidence of an agreement by the applicant to divide the land, then no other inference can be drawn from the above decision than that this court would not have sustained the finding of the land department against the applicant on that point.

Or to put it in another form: Assume the undisputed facts showed that a mortgage on the land

was given by the applicant to another, and the land department held such mortgage to be within the purview of the statute against division, and hence, as before, decided against the applicant, would this court, holding as a matter of law that the statute did not cover a mortgage, sustain the decision of the land department?

But as we understand the decision of the Minnesota court in the case at bar it is that "all matters relating to the applicant's status as a purchaser in good faith, as well as his citizenship," are conclusively determined by the land department even though the facts be undisputed.

Although we do not question the citizenship of Ireland, yet as an illustration of the extreme position taken by that court herein, let us assume that a Filipino, under his present status of non-citizenship as held by this court, had as vendee of the railway company applied to purchase land under the 5th section of March 3, 1887, would this court sustain a decision of the land department allowing him to purchase?

If a court would do so, why was it necessary for the Federal court to discuss the question of citizenship at all in U. S. *vs.* S. P. Ry. Co., 88 Fed. Rep., 832, wherein citizens grantees of aliens who had purchased from the railroad were held to be proper applicants "especially in view of the amendatory and supplemental act of Congress of March 2, 1896, under which *bona fide* purchasers for value of such lands are confirmed in their purchases, even though they be aliens"?

Of course, the questions of residence and cultivation of land by an applicant and of the mere proofs thereof belong peculiarly to the land department as held in Vance *vs.* Burbank, 101 U. S., 519. So as to whether in fact surveys have been made or other lands have been actually taken for the grant.

Quinby *vs.* Conlan, 104 U. S., 420.

In Carr *vs.* Fife, 156 U. S., 494, the only question at issue was whether the applicant had abandoned the land, clearly one of fact; and in Catholic Bishop *vs.* Gibbon, 158 U. S., 155, the questions considered, as stated by the court, were, "whether there was at Vancouver a missionary station, and also a like question, if one existed, how much land it occupied."

But seemingly the authority on which the Minnesota court chiefly relied as a basis of its decision on this point is Green *vs.* Humford, 50 Pa. St., 215.

In that case the plaintiff sold a horse for $115.00 of which $100,00 was counterfeit money. His vendee sold it to the defendant, and the court left to the jury the question as to whether the defendant at the time of his purchase had such knowledge of the facts of the fraud in the original purchase that he could not become a *bona fide* purchaser for value.

We fail to perceive how that decision can be germain.

As an illustration of what is a question of fact, as to which the findings of the land officers would

be conclusive, the case of Lee *vs.* Johnson, 116 U. S., 48, is a good one, but in the opinion therein the court says:

> "If, however, these officers mistake the law applicable to these facts, or misconstrue the statutes, and issue a patent to one not entitled thereto, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner."

The construction of any written instrument, such as the option offered by Ireland in the case at bar, is for the court.

Baer *vs.* Minock, 87 N. W., 1045 (Mich.).

If on a trial before a jury such option had been offered and received in evidence even without objection, the question as to whether it would constitute Ireland a purchaser within the act of March 3, 1887, would not have been left to the jury as a question of fact, but the court would have been compelled to instruct a verdict one way or the other, according to the construction he might place on said act.

Ireland's Bona Fides a Legal Conclusion.

Warvell on Vendors, at p. 609, says:

> "A purchaser in good faith, in the language of the books, must be innocent. * * * The first essential ingredient of legal innocence is

> 'good faith,' a term which legal lexicographers, courts, and writers have avoided defining much the same as 'fraud' and other words of common daily use."

In the Encylopedia of Pleading and Practice, vol. 12, p. 1031, under the head of "Legal Conclusions," it is said a statement "that the pleader was an innocent purchaser is a legal conclusion." Citing Wing *vs.* Hayden, 10 Bush. (Ky.), 280, as authority.

In that case the court said:

> "An allegation in an answer that a defendant is 'an innocent purchaser,' was held insufficient and a conclusion of law, not being equivalent to a statement that he purchased without notice of the appellee's homestead right."

The same authority, at p. 1033, states that "unlawful," "illegal," or "wrongful" are conclusions of law.

As to "Fraud," it is stated:

> "Whether fraud be alleged in the declaration bill, or set up by way of defence in the plea, answer, or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer."

Vol. 9, p. 687, citing among others—

Fogg *vs.* Blair, 139 U. S., 118.

St. L. & C. Ry. Co. *vs.* Johnson, 133 U. S., 577.

See also—

Ritchie *vs.* McMullen, 159 U. S., 241.

"The reason of this rule is that fraud is a conclusion of law from facts stated and it is a well-settled rule of pleading that facts and not legal conclusions are to be pleaded."

Vol. 9, p. 688.

Clearly it seems that in the case at bar this question before the land department was one of pure law, and its decision is reviewable by the courts.

We have felt constrained to treat of the issues herein somewhat more exhaustively than the amount involved would seem to warrant, but in the decision of this as a test case by stipulation are involved fifty other quarter-sections of land held by as many heads of families similarly situated as is the plaintiff in error herein. Nor is it the pecuniary interest alone that stimulates to special effort, but of greater importance by far is the loss or preservation of the homes which these settlers have for more than a decade cultivated and improved, and in which they have reared their families, in the hope and expectation that they would remain permanently their own. These reasons are sufficient to call for the careful deliberation of the court in reaching its conclusion in the case at bar, aside

from the correct legal principles to be established.

Firmly believing the conclusions of the lower court not to be in conformity with such principles, we invoke the aid and judgment of this court in a reversal of that decision.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

October Term, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Reply Brief for Plaintiff in Error.

In reply to the two briefs filed by defendant in error, as well as to points made in the oral argument, we submit the following by leave of the court:

I.

Speculative Purpose of Ireland.

Counsel for defendant in error, in answer to our statement that Ireland's agreement with the railroad company was intended by him as a speculation, and that he did not want to purchase any

lands which he could not sell at a profit, contended that his whole purpose was philanthropic and to settle up the country with members of his church, and in no sense for gain; that he had benefited or helped them was the reason why he wanted to get the title in his own name.

The record shows (p. 16) that Ireland applied to purchase 22,560.44 acres of land, covered by his two contracts embracing the land in controversy. It also shows by the admission of O'Connor, the defendant in error (p. 35), at the Ireland hearing in the land department, that he had purchased of Ireland 7,700 acres of the land embraced in his application, equal to 48½ quarter-sections and more than one-third of all the lands Ireland sought to purchase, and yet he never settled upon any of the lands or put a dollar's worth of improvements upon them. He also refused to exhibit his contracts, or any of them, at the hearing (Rec., p. 37). This is a sufficient answer to their contention that Ireland settled up the country.

The record also shows that Ireland introduced in his behalf a contract he had made with one Tyler, constituting him an agent to sell another large portion of the lands at not less than $6 an acre (except by consent of both parties), which had not been sold at the close of the hearing or it would have been so shown. (Rec., pp. 29 and 30.) He also strenuously insisted upon his right to purchase all the land for which he had made contracts under his agreement of 1880, wherein, as held by

the land department, he was simply acting as the agent of the company, and he was denied the right to purchase them.

Neither can it be contended that his application to purchase these lands was on behalf of the persons with whom he had made contracts, or was in any manner an act of kindness to them; but, on the contrary, they could all have made homestead entry of their lands and obtained title free, instead of having to pay Ireland from $4 per acre up. It must not be forgotten either that these contracts were made upon the understanding that he was to pay the company $4 an acre less ten per cent. his commission for selling the lands, but as it did not get title, he was permitted to buy from the Government under the act of 1887 at only $1.25 per acre. So it will be seen that, instead of aiding the settlers to get title, he prevented them from getting title from the Government and compelled them to pay him the amounts specified in their contracts, which were made upon the basis that he was to pay $4 instead of $1.25 per acre. Hence, it will be seen, it was only O'Connor and men like him *who were not settlers, and Ireland himself* who were benefited by his application to purchase.

II.

Initiation of Homestead Claims by Settlement.

The following assertion in the first brief filed by defendant in error, found at page 18, deserves notice:

> "Counsel for plaintiff in error contend that there is a rule of the land department with reference to the public lands to the effect that an intending settler, by mere occupancy, may acquire a vested right in land *not subject to entry*. We know of no such rule, and this court has decided that occupancy without entry, made or offered, confers no right whatever. (Northern Pacific R. R. Co. *vs.* Colburn, 164 U. S., 383, and Nelson *vs.* Ry. Co. 188 U. S., 108.")

It is sufficient to say that this proposition was urged in the dissenting opinion in the Nelson case, but held adversely by the decision. It is true that, in the Nelson case, the land was unsurveyed, but the rule is the same, whether surveyed or unsurveyed. The language of the 3d section of the act of May 14, 1880, in specific terms includes both classes of lands. This has been the ruling of the land department since the decision of Secretary Teller in the case of the Southern Pac. Ry. Co. *vs.* Lopez (3 L. D., 130), decided October 2, 1884.

This decision is followed in the case of Tobias Beckner (6 L. D., 134), and the following quotation made from Secretary Teller's decision, above referred to.

Secretary Teller, commenting upon the act of May 14, 1880, said:

> "This act introduced several new features into the homestead law, and, among others, *the initiation of a homestead claim by settlement, whether the land is surveyed or unsurveyed.*"

The Secretary follows this quotation with his opinion, as follows:

> "The act of May 14, 1880, was an enobling or enlarging statute, remedial in its nature, granting larger powers, rights, and privileges to the settlers than was embraced in the original act. The sole purpose and object of the 3d section of said act was to provide for the initiation of a homestead right by settlement, whether upon surveyed or *unsurveyed* lands, and the settler is protected in this inchoate right against every one else except the Government."

These cases are followed by the cases of E. S. Newman, 88 L. D., 448; Preston B. Howard, 8 L. D., 286, and other cases, and the doctrine decided is disputed in no case.

We do not contend that the claim of the plaintiff in error falls within the terms of either of the provisos of the 5th section of the act of March 3, 1887. If it did, his right would be superior to Ireland's, however valid his purchase, since all lands falling within their terms are expressly excluded from the operation of that act. But we do insist *his right to the land attached immediately* upon the *revocation of the withdrawal*, whether that took place September 29, 1890, the date of the repealing act, or May 22, 1891, the date the Secretary promulgated that repeal. It is not at all material to his case which. And that, as against the whole world, his claim to the land is good, provided he can show Ireland had no legal right to purchase the land under his pretended contract.

There is also a line of cases holding that settlers may acquire rights to lands by settlement, which are not *open to entry*, because covered by another entry or by a railroad selection.

These decisions begin with the case of Geer *vs.* Farrington (4 L. D., 410), decided by Secretary Lamar March 3, 1886, and that case is followed by the cases of—

Gudmundson *vs.* Morgan, 5 L. D., 147; Houf *vs.* Gilbert, Ibid, 238; Wiley *vs.* Raymond, 6 L. D., 248; Austin *vs.* Thomas, Ibid, 833; Tarr *vs.* Burnham, Ibid, 709, decided by Secretary Vilas May 2, 1888; Rothwell *vs.* Crockett, 9 L. D., 89; Pool *vs.* Moloughney, 11 L. D., 197; Etnier *vs.* Zook, Ibid, 452; Smith *vs.* Place, 13 L. D., 214; Kruger *vs.* Dumbolton, 7 L. D., 212; Stone *vs.* Cowles, 14 L. D., 90; McInnis *vs.* Cotter, 15 L. D., 583; Lough *vs.* Ogden, 17 L. D., 171; Neal *vs.* Cooley, 18 L. D., 3; Davidson *vs.* Gelinas, Ibid, 392; McMichael *vs.* Murphy, 20 L. D., 147; Hunter *vs.* Blodgett, Ibid, 452; Giles *vs.* Troop, 25 L. D., 448; H. & D. Ry. Co. *vs.* Arnold, 26 L. D., 538; Hanson *vs.* Roneson, 27. L. D., 382, and Olson *vs.* Hagerman, 29 L. D., 125.

The case of Tarr *vs.* Burnham, above cited, was the first case in which the department applied the same principle to land covered by a railroad withdrawal as it had been applying to land embraced in an uncancelled entry, citing the original case of Geer *vs.* Farrington, *supra*, decided by Secretary Lamar.

These decisions are to the effect that while a settler upon land withdrawn or covered by a prior entry acquires no rights against the United States or the corporation for which the withdrawal was made, or the record entryman, as the case may be, yet as against all other adverse claimants, his rights attach *eo instanti* upon the revocation or cancellation of the withdrawal or entry, to the exclusion of all claimants who cannot show a better title.

The doctrine laid down by these cases was clearly stated by Secretary Chandler in the case of Pool *vs.* Moloughney, *supra*, decided August 20, 1890, as follows:

> "The department has repeatedly held that, where land had been covered by a homestead or other entry that was afterwards cancelled, settlement upon the tract prior to such cancellation, especially if attended by the possession and ownership of valuable improvements, whether made or purchased, was sufficient to constitute a legal claim that would attach to the land the instant it become again a part of the public domain. See McAvinney *vs.* McNamara, 3 L. D., 552; Millis *vs.* Burge, 4 L. D., 446; Cathran *vs.* Davis, 5 L. D., 249; Wiley *vs.* Raymond, 6 L. D., 246; Kruger *vs.* Dumbolton, 7 L. D., 212. The same rule has been applied where land has been withdrawn for the benefit of a railroad company. See Peterson *vs.* Kitchen, 20 L. D., 181; Houf *vs.* Gilbert, 5 L. D., 239."

III.

As to the proposition that the mere presentation of Ireland's application to be allowed to purchase under the 5th section of the act of March 3, 1887, being such a disposition of the land as to preclude the consideration of that of Gertgens and other homestead settlers whose appeals from the rejection of their applications to purchase were pending in the land office when Ireland was notified he could come forward and make his publication and proof, it is so abundantly contradicted by the record that it shou'd not be necessary to discuss it.

The mere fact that in this same letter (Record, p. 104), in which the local officers are so told, they were instructed by the Commissioner to inform Ireland that in addition to the usual published notice that "he must be careful that all parties now known (Gertgens and all these settlers whose appeals are pending), or who may become known before the closing of the case before them, to be *adverse claimants* to any of said lands are *given special notice thereof*." Why should they be given special notice if, as contended, the land had been already disposed of to Ireland? In point of fact, they did come in and make defense and followed up their defense to the final decision by the Secretary, and no one ever had the temerity to suggest to the land department that these settlers were barred from acquiring any rights or presenting their claims because of the assertion of Ireland's claim, or of the statements in the

Commissioner's orders that no disposition of these lands should be made until all of these claims were adjudicated by him. Such a position would have met with ridicule only by the land department and found its first announcement in the Minnesota court in this case.

IV.

The Contract.

In addition to the authorities cited in our original brief, as to the invalidity of Ireland's option agreement, without consideration or mutuality of engagement, we invite the further attention of the court to the two cases which were mentioned in the oral argument and not dwelt upon for lack of time.

The case of W. S. Campbell *vs.* A. Lambert & Co., (36 La. Ann., 35), is stated in the syllabus as follows:

> "An agreement by which one party engaged to deliver to the other such quantities of coal as the latter may require during the year 'to the extent of sixty thousand bushels with privileges of twenty thousand more' at a stipulated price, but containing no obligation on the part of the latter to take or pay for any stipulated quantity is a *nudum pactum* from the performance of which the promisor may at any time withdraw. One promise may be a good consideration for another promise, but there must be a mutuality of engagement."

In the opinion the court said :

> "But on plaintiffs, own theory, it is manifest that the agreement is a *nudum pactum*. We scan its provisions in vain to find the imposition on Campbell of any obligation to take or pay for any amount of coal whatever. He undertakes nothing except to pay, at the end of each month, for such coal as he may have chosen to order. One promise may be a good consideration for another promise, but not unless there is an absolute mutuality of engagement so that each party has the right at once to hold the other to a positive agreement." 1 Parsons Cont., p. 448.

After quoting from Burnett *vs.* Bisco, 4 Johns., 235; Bran *vs.* Burbank, 16 Me., 458; Mers *vs.* Franklin, 68 Mo., 127, and Houston *vs.* Mitchell, 38 Texas, 85, the court say :

> "If the condition upon which defendant's promise was to take effect had been the doing of something involving labor or other value by Campbell, and upon the faith of said promise and before its revocation, Campbell had done the thing, different principles would apply, not necessary to specify here. But the foregoing cases sufficiently show that the mere exercise of an option to exact the performance of a promise, does not alter the situation of the parties and does not prevent the promisor from exercising his right of refusal.
>
> The authorities quoted are sound and applicable to our law.
>
> On these grounds we hold that defendants were not bound in law to execute the naked promise contained in their agreement, but had

the right, at any time, to refuse to proceed in execution thereof, and for such refusal, are not responsible in damages to plaintiff."

The case of Joseph Rafoloritz *vs.* The American Tobacco Co. (73 Hun. N Y., 87), decided by Mr. Justice Parker is thus stated by the court:

"On or about the 10th day of April, 1892, the defendant and Joseph Rafoloritz and Son * * * entered into an agreement or contract whereby and wherein the defendant promised and agreed, in consideration that said Joseph Rafoloritz and Son would purchase and sell a certain cigarette manufactured by defendant, that he, the defendant, would allow and pay them as a compensation or commission for said purchase of cigarettes twenty cents on every thousand of said cigarettes manufactured by defendant and purchased by said Joseph Rafoloritz and Son, between the 10th day of April and the 1st day of October, 1892. It seems that Joseph Rafoloritz and Son did thereafter purchase nearly 200,000 cigarettes, upon which purchase the defendant paid the promised commissions. Then it refused to sell plaintiff any more cigarettes, hence this action. The court held that there was no mutuality of contract, and, therefore, not enforcible. That it would have been otherwise had the plaintiff found himself to have purchased a given quantity of cigarettes.

That under the agreement, as alleged, it was optional with the plaintiff to purchase cigarettes or not. If, after making it, he had refused to take any, or after taking a few thousand, had declined to purchase others,

the defendant could not have compelled him either to take cigarettes or respond in damages for not doing so. And as he made no promise there was no basis for a consideration for the promise of the other party to the alleged agreement. In support of such position the court cited Chicago and Great Eastern Ry. Co. *vs.* Dane (43 N. Y., 240), and Hurd *vs.* Gill (45 N. Y., 341)."

The judgment of the lower court was affirmed.

Supplemental Brief for Defendant in Error.

We do not deem it necessary to reply to the arguments in the supplemental brief filed by defendant in error as to the terms of the grant of 1857, since the land was not required to be withdrawn by that act, was not withdrawn under it, but under the 4th section of the act of March 3, 1865, as uniformly held by the land department and fully recognized by Congress in the repealing statutes of September 29, 1890, as well as by the decision of Secretary Noble. (Rec., p. 90).

The land is not within the granted limits of the acts of 1857, 1864, or 1865, and of course there was no absolute grant of lands in indemnity limits under the act of 1857 any more than under any other of the grants made.

Another point which we will notice is the proposition that plaintiff in error, who seeks equity, does not offer to do equity by returning to O'Connor the amount paid to the United States for the land, to wit, $1.25 per acre.

It is only necessary to say that he did not pay it to or at the instance of plaintiff in error, neither did he receive the benefit of it, or could he receive any benefit, as if successful he will enter the land under the homestead laws.

Again, defendant in error must look to the United States, under the repayment statutes, for the refunding to him of the amount paid them. The Government received his money, and if it failed to make a valid title to him for the lands which properly belonged to plaintiff in error, it is difficult for us to see any good reason why he should pay or tender the amount to defendant in error.

Referring to the paragraph in the stipulation filed at the hearing in the land department (Rec., pp. 38 and 39), read by counsel in oral argument, to the effect that parties acted under advice of counsel, &c., it will be observed this paragraph, by its terms, applies only to those protestants who had made contracts with Ireland, and not to the plaintiff in error, who made no contract. It was a general stipulation, covering several classes of claimants, and was so drawn as to cover the different cases.

There is absolutely nothing in the record to show that plaintiff in error had any knowledge whatever of Ireland's claim until he was specially notified to appear at the hearing upon Ireland's application to purchase. Neither is there anything in the record showing that any improvements whatever were ever made upon any of the lands

embraced in his application under his 1883 contract by Ireland or any one holding a contract under him.

In answer to an inquiry made by Mr. Justice White, during the oral argument, whether, under such a contract as Ireland's 1883 contract, if he had gone upon the land and made improvements, that would have been a sufficient consideration, we beg to call attention to the decision of the Supreme Court of Colorado, in the case of Gorden *vs.* Darnell, 5 Colo., 303, quoted from in our original brief at pp. 72 and 73, holding that such expenditures not having been required by the agreement, are merely voluntary, and furnish no consideration for the option. We also invite attention to the cases referred to in that decision.

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Supreme Court of the United States.

OCTOBER TERM, 19

No. 65.

Supreme Court U.S.
FILED
NOV 7 1908
JAMES H. McKENNEY,
Clerk.

JACOB GERTGENS,
Plaintiff in Error,

vs.

JOHN P. O'CONNOR.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

E. T. YOUNG and
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Attorneys for Defendant in Error.

Supreme Court of the United States.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

As the record is voluminous and confusing, we submit the following synopsis of the "Stipulation of Facts," upon which the case was tried below.

The action involves the title to the land described in the complaint and other land similarly affected, all of which was embraced within the limits of the

indemnity grant for the St. P. M. & M. Railway Company, by act of March 3rd, 1865 (13 Stat. 526), section 7 of which is as follows:

"And be it further enacted that, as soon as the Governor of the State of Minnesota shall file or cause to be filed, with the Secretary of the Interior, maps designating the route of said road and branches, *then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.*"

After filing of the map of definite location, by letter dated May 25th, 1869, the commissioner of the general land office, under instructions from the secretary, duly withdrew from the public domain and from settlement and entry the lands within said indemnity grant (Record fol. 96) and on April 22nd, 1885, they were all regularly selected by said company to make up designated losses within the "place limits" of its "Main Line" grant. In 1891, with the consent of the land department, such selection was amended by withdrawal of the specifications of losses first filed, and substituting therefor a specification of losses of "place lands" arising in the grant for the "St. Vincent Extension Railway" of said company (16 Stat. 588). By act of September 29th, 1890, (26 Stat. 496) said section 7 of the act of March 3rd, 1865 was repealed.

On May 22nd, 1891, the secretary of the interior, in a communication to the commissioner of the general land office, ordered that there be restored to the public domain, and opened to settlement and entry, "in accordance with the rules heretofore established in similar cases," the lands within said indemnity

grant of March 3rd, 1865. (Ex. "B," Record, fol. 143.)

On May 28th, 1891, the commissioner, by letter addressed to the proper local officers, (Ex. "C", R., fol. 150) directed them to proceed in the manner therein specified to restore to the public domain and to open to settlement and entry, "all land heretofore withdrawn in your district within the indemnity limits of the grant for the St. P. & M. Railway Company not embraced in selections heretofore made or applied for by said company." These directions were duly complied with; and thereafter, in the adjustment of said railroad grant, said selections were cancelled; expressly reserving, however, disposition of the lands in controversy until the claim thereto of Archbishop John Ireland of St. Paul, hereinafter referred to, should be finally adjudicated. (Ex. "I 1" R. fol. 166).

Meanwhile, on July 17th, 1880, a contract was made between said railway company and said Archbishop Ireland (Record, fol. 14-17) whereby he was given the exclusive right to place settlers on a designated portion of these indemnity lands, the same to be paid for at four dollars per acre when title could be obtained by the company. Under its authority said Ireland made contracts with a large number of settlers, who went upon the respective tracts so purchased by them, and continued to reside thereon; and each of them, by virtue of said contracts, afterwards acquired and received patent to the tract so purchased and occupied by him under

the provisions of the 5th section of the act of March 3, 1887 (24 Stat. 556).

On March 30th, 1883, a new contract was entered into between said railway company and said Ireland, (R. fol. 19-20) whereby, instead of agreeing to place settlers upon the land of the railway company, said Ireland contracted to purchase for himself 50,000 acres of the land described in the first contract, which then remained undisposed of.

His purpose throughout was to establish, on these agricultural lands, a colony of his own religious faith from among the immigrants flocking to the Northwest; and his efforts in this direction, commenced under his said first contract with the railway company, were continued for several years after the second contract was made. But thereafter he adopted a different form of contract with his vendees, to that used when he was operating under the contract of 1880. The essential difference between his contract with the settlers before and after March 30th, 1883, was that, under the latter, the settlers were required to look to *him* for their title; while, under the former, they were required to look for their title to the *railway company*.

Under his colonization scheme settlers were placed by said Ireland upon all of the lands included in the above described contracts, except upon about 8,000 acres which had been disposed of by him to persons who did not take up their residence upon the land.

A part of this latter land was purchased by de-

fendant in error, and includes the tract in controversy.

Upon these lands, so disposed of to persons who did not take up their residence thereon, certain persons located, claiming under the homestead law—the plaintiff in error being among the number—and this action will determine the rights of all such "squatters," as against said Ireland and his vendees.

All the persons who made contracts with said Ireland for the purchase of specific portions of this land, while he was operating under his *first* contract with the railway company, received title to their respective tracts directly from the *government*, as bona-fide purchasers from the railway company, under the 5th section of the act of March 3rd, 1887; and said Ireland was given title, under the same decision, to the lands covered by his *second* contract above mentioned (Rec. fol. 52-71). He was treated by the land department as having the rights, as a bona-fide purchaser under his contract of 1883, that were accorded the vendees who had dealt with him while he was operating under the contract of 1880. The land thus conveyed to him by the government was immediately conveyed by him—or through his trustee (The Minneapolis Trust Company)—to the several individuals to whom he had sold the same, many of whom were occupying the land; although a few, like the defendant in error, were not residing thereon. Before this action was begun, the title to all the lands covered by both contracts had passed from the government under said 5th section of said act of 1887; a part

directly to said vendees of said Ireland, and the rest directly to him. No question is raised as to the title of any of the lands, except the portions owned by purchasers from said Ireland, who did not reside upon the land purchased.

On April 15th, 1891, plaintiff in error, a qualified homesteader, settled upon the land in controversy, but offered no homestead application therefor until April 27th, 1895. His proferred homestead filing of that date was rejected by the local land officers on account of the pending selections theretofore made by said railway company. From their decision he duly appealed to the commissioner of the general land office. This appeal was never further considered in the land department, except to the extent of giving the claimant therein notice of the application made by said Ireland to make proof and payment for the land as a purchaser thereof as above stated.

It appears from the stipulation that the question of said Ireland's right to make proof and payment for this land under the 5th section of the act of March 3, 1887, has been considered, and adjudged in his favor by the officers of the local land office; the commissioner of the general land office; the secretary of the interior; the district court, and the supreme court of Minnesota.

Referring to the "Stipulation of Facts" (Record, fol. 95-141), although it contains more than one hundred distinct allegations or statements of, or in re-

spect of, past or existing facts, events or circumstances, most of them are in the nature of introductory recitals or in identification of the exhibits set out in the record. The foregoing synopsis contains all that is essential to the proper consideration and decision of the case.

Scope of this Review.

By the prosecution of the writ herein, error is imputed to the supreme court of the state of Minnesota; and we assume that only such errors, if any, in matters of law, in the decision and judgment of the supreme court, as appear therefrom, and from the opinion filed therewith, to have occurred, to the prejudice of plaintiff in error, will be considered here.

We further assume that, no matter how erroneous the decision and judgment of the trial court may have been, either in arriving at one or more ultimate or inferential facts, or in one or more of its conclusions of fact or of law—yet, if, for any reason, or upon any ground, the *evidential* facts would have justified a judgment for the plaintiff; or, if not, and yet if the error was not properly taken advantage of—in either or any of those events, the supreme court was right in affirming such judgment of the trial court.

Also that if for any reason, or upon any ground, the supreme court would have been justified in affirming such judgment of the trial court, either upon the ultimate facts found by it, or

any of them—whether because of stipulation, proof or waiver, or under any applicable rule of law; or, again, if the supreme court committed error and such error related to matters of fact, or of mixed law and fact—in any of those cases, this court will not reverse the judgment of the state supreme court.

Whether we are right or not, upon all or any of these propositions, it is important to ascertain, at the outset, the precise character and operation of the decision and judgment of that court. The judgment, in terms, is an affirmance of that of the trial court in favor of the plaintiff therein—defendant in error here—and *that* judgment "adjudged and determined that said plaintiff (was) the absolute owner and entitled to the immediate possession of" (the premises in controversy).

Plaintiff in error claims that, through a misconstruction of the law by the officers of the land department, the legal title to the land which should have been given to him, under his homestead application, was given to said Ireland; and, in this action, he seeks to bring his claim within the rule of Johnson v. Towsley, 13 Wall. 72.

The three principal points of the controversy therefore are:

1. *Is the title of defendant in error, as adjudged by the land department, open to question anywhere, by anybody?* If so, then,

2. *Did plaintiff in error have such a vested right to the land in controversy as to be in position to question the act of the government in conveying its land to said Ireland?*

If so then, - ,

3. *Was said Ireland, under his contract of March 3rd, 1883, a bona fide purchaser of the land in controversy, within the intent and meaning of the 5th section of the act of March 3rd, 1887?*

We will now take up these questions in their order.

I.

Is the action of the land department conclusive?

The answer to this depends to a considerable extent upon whether the determination of the land department that said Ireland was a "purchaser" from the railway company, within the meaning and intent of the 5th section of the act of March 3, 1887, was the decision of a question of fact, or a question of law, or a mixed question of law and fact.

This we believe to be the controlling question. If this court holds with the supreme court of Minnesota, that the matter of said Ireland's qualification as a purchaser under this section was a question of fact, the decision of the land department thereon was final and cannot be questioned elsewhere.

In this connection we desire to call the attention of the court to the order of Secretary Vilas as reported in 8 L. D. 27-29, where he says:

"Inasmuch as the privilege conferred by this act is but a preferred right of purchase—a special pre-emption right— which would be perfected by the payment of the price of the land and the issue of cash entry certificate, as in pre-emption entry, it would seem eminently proper to adopt the same mode of procedure, so far as applicable, as is used in making final proofs in that class of cases."

Again on page 277 of the decision in Union Colony Co. v. Fulmele, et al., (16 L. D. commencing at p. 273) it is further declared that the distinction between this section of the act of 1887 and the general pre-emption law is that, under this act, there is no limitation as to the quantity of land that a purchaser may be allowed to enter. The secretary there says:

"For what land the purchaser has bargained, he may make payment to the United States at the ordinary price for like land, and thereupon patent shall issue therefor."

It is clear from these decisions and from the terms of the act itself, that an applicant under this section is a special *pre-emptioner*, and that all matters affecting his status as a purchaser from the railway company, as well as his citizenship, are matters which constitute his QUALIFICATIONS as such special pre-emptioner.

In Vance v. Burbank, 101 U. S. 519, the decision of the land department upon the qualifications of a patentee under the "donation act" (9 Stat. 496), was

assailed. That act required the department to find that the applicant was a settler or occupant, that he was over the age of 18 years; that he was a citizen of the United States or had declared his intention to become such; that he had resided upon and cultivated the lands for four consecutive years, and had "otherwise conformed to the provision of the act." The court said:

"The question in dispute is one of fact, that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the land in dispute for four consecutive years, *and had otherwise conformed to the requirements of the donation act.* This was to be determined by the land department; and, as there was a contest, the contending parties were called upon in the usual way to make their proofs. They appeared and full opportunity was given Scott to be heard; he presented his evidence and was beaten, after having taken the case through by successive stages on appeal to the secretary of the interior. This, in the absence of fraud, is conclusive *on all questions of fact.* We have many times so decided. The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi-judicial tribunals are.

"It has also been settled that the fraud, in respect of which relief will be granted in this class of cases, must have been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department; so that it may properly be said that there has never been a decision in a real contest about the subject matter of the inquiry. False testimony, or forged documents, even, are *not enough* if the disputed matter has actually been presented to or considered by the appropriate tribunal. The decision of the proper officers of the department is in the

nature of a judicial determination of the matter in dispute."

In the case of Bishop Iron Co. v. Hyde, 66 Minn. 24 (31), which was affirmed here (177 U. S. 281), the court, citing above case as its authority, says:

"The competency of the defendant to comply with the requirements of the pre-emption act—his qualification as a pre-emptor—WAS A QUESTION OF FACT, peculiarly for the determination of the officers of the land department. It has repeatedly been held that the decision of these officers is conclusive on a question of fact, in the absence of fraud."

In the case of Potter v. Hall, 189 U. S. 292, the territorial court decided that Potter held the land in trust for the defendant because he was disqualified from making a homestead entry in the Oklahoma tract by having gone within its limits during the prohibited period; and that the action of the land department in holding to the contrary was an error of law and was not conclusive upon the court. In the opinion of this court, delivered April 6th, 1903, it was said:

"It remains only to consider whether error was committed by the department—in finally ruling that the entry made by Potter on the morning of the 22nd of May, before he returned to the land to take part in the race—which involved error of law reviewable by the courts. But, as such entry did not, as a matter of law, preclude Potter's right to go outside of the territory and take part in the race for land, but depended upon whether, as a matter of fact, he obtained by his previous going into the territory a substantial advantage over others, which he would not have otherwise possessed, it follows that the final conclusion of the department that no such advantage resulted, INVOLVED BUT THE FINDING OF AN ULTI-

MATE FACT, AND NOT A CONCLUSION OF LAW, AND IT IS THEREFORE NOT REVIEWABLE. The fact that the final conclusion as to the ultimate facts reached by the department differed from the conception of such ultimate facts entertained by the department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached which was binding between the parties."

We invite attention also to the opinion of the Minnesota supreme court in this case upon the same question. (Record, fol. 115-117).

II.

IF ACTION OF LAND DEPARTMENT NOT CONCLUSIVE CAN PLAINTIFF IN ERROR QUESTION IT?

The answer to the above question depends upon the status of the land from the date of the grant on March 3rd, 1865, to the time of its conveyance by the government to said Ireland.

This requires consideration of—

1. Section 7 of the act of March 3, 1865, and its repeal by the act of September 29th, 1890.
2. The executive withdrawal of the land under date of May 25th, 1869, and its limited revocation in 1891.
3. The status of a purchaser under the 5th section of the act of March 3, 1887.

Counsel for plaintiff in error strenuously contend that section 7 of the act of 1865, which declared it to

be the duty of the Secretary of the Interior, upon the filing of the map of definite location of the road, to withdraw the land from settlement, was self-executing and effected a legislative withdrawal.

Not only are the stipulation (R. fol. 95) and decision (R. fol. 183) directly to the contrary, but such a contention needs no other refutation than is afforded by the reading of the section. Language could not well be plainer. Congress had power to make the withdrawal; but, instead of doing so, it made it the duty of the secretary to act, when the map of definite location should be filed. His action was executive, not legislative.

Counsel make the unwarranted claim that the withdrawal was solely legislative, in order thereby to lay the foundation for their other claim that the repeal of said section 7 of the act March 3, 1865, by the act of September 29th, 1890, *revoked the withdrawal.* If the first contention were true, the truth of the second would certainly follow. No authority is needed upon the proposition that the unconditional repeal of a law ends its existence. It seems equally clear that a mere "withdrawal," which gives no vested right in land, if made solely by a statute, could not survive the repeal of the statute.

But no proposition is better established than that the Secretary of the Interior has the power, *virtute officii,* to make withdrawals of the public lands.

Wolsey v. Chapman, 101 U. S. 755.

Wolcott v. Des Moines, U. & R. Co., 6 Wall. 681.

Spencer v. McDougal, 159 U. S. 61.

The conditions of the exercise of that power in aid of land grants are discretionary, where the grant is silent on the subject. In this instance congress expressly directed the withdrawal to be made, and converted the discretionary power into a positive duty. In like manner, by the act of September 29th, 1900, when congress desired to invest the secretary with the discretionary power to revoke the withdrawal at his will, it repealed the section which had required him to make it. By neither act did congress enlarge or diminish the general powers theretofore possessed by the secretary.

The Secretary of the Interior, discussing this question in his letter of May 22nd, 1891, to the commissioner, wherein he directed the revocation of the withdrawal (Ex. "B" R. fol. 142) says:

"It is within the authority of the department to revoke an executive withdrawal of indemnity land. If the indemnity withdrawal for the benefit of the St. P. & S. C. R. R. Co. was made under legislative direction contained in *section 7, act of March* 3, 1865, no legal objection can now be made to the revocation of such withdrawal, as said section is repealed by the act of September 29th, 1890." (R. fol. 146).

Counsel for plaintiff in error, with equal disingenuousness, contend that the secretary's letter of May 22nd, 1891, to the commissioner—who is the administrative officer of the land department—in which he directs that, after the usual notice, the

lands "be restored" to settlement according to rules theretofore established, operated, *ipso facto*, as a revocation of the withdrawal; and that it effected a restoration of the land to settlement, regardless of rules or the subsequent action of the commissioner or local officers to the contrary. The commissioner must have been as incapable as we, of understanding the secretary's letter of May 22nd, if it had the meaning or effect contended for by counsel. He seems not to have been aware that either the act of September 29th, 1890, or the secretary's letter of May 22nd, 1891, communicating to him—the administrative head of the land department, for execution, the secretary's decision and *direction to have the withdrawal revoked in the usual way*, had itself revoked the withdrawal; because, on May 29th, 1891 (Record, fol. 93) he—the commissioner—instructed the *local land officers*, with reference to this grant as follows:

"YOU are directed to RESTORE to the public domain and open to settlement and entry, all lands heretofore withdrawn in your district within the indemnity limits of the grant for the St. P. M. & M. Railway Company *and not embraced in selections heretofore made, or applied for by said company.*" The only action ever taken by the local officers in this or any other like matter was in obedience to the above or similar instruction of the *commissioner*. It is therefore, as unreasonable to claim that there was an unconditional revocation of the withdrawal, as to lands "*embraced in selections theretofore made or applied for by said railway company*," *and then*

pending in the department, as it would be to assert that a declaration of war is equivalent to the unconditional surrender of the enemy.

If, then, the lands were not opened to settlement by this proceding of the department, it follows that they remained withdrawn and not subject to settlement or entry—at least until the order of October 23, 1896, by which the selections above referred to were cancelled (Ex. "I-1" Record, fol. 101). But the concluding language of this order of cancellation is as follows:

"A large portion of these lands have been applied for by parties claiming them under the settlement laws, and by said Ireland, who claims under act of March 3, 1887 (25 Stat. 556), as a purchaser from the St. P. M. & M. Railway Company. *No disposal will be made* of these lands until the above claims are *adjudicated* by this office. So advise the parties in interest!"

The lands were certainly not opened to settlement or entry by *this* order; but, as expressly stated therein, and as held by the supreme court of Minnesota, they were still withheld until adjudication by the general land office of the claims of said Ireland and the plaintiff in error and of the parties who were contesting his right to a portion thereof. The next day—October 24, 1896—(Ex. "K" Record, fol. 102) the commissioner directed the local land officers to allow said Ireland, under his then pending application, to make proof of his claim to said lands as a purchaser from the company; and thereupon his

proof was made and accepted and the land conveyed to him.

Counsel for plaintiff in error contend that there is a rule of the land department with reference to the public lands to the effect that an intending settler, by mere occupancy, may acquire a vested right in land *not subject to entry*. We know of no such rule, and this court has decided that occupancy without entry, made or offered, confers no right whatever.

Northern Pac. R. R. Co. v. Colburn, 164 U. S. 383.

Nelson v. Ry. Co., 188 U. S. 108.

Neither do we get any light whatever upon the effect of the withdrawal in this case by reference to or quotation from cases cited by them of Hewitt v. Schultz, 180 U. S. 139; or Oregon & C. Ry. Co. v. U. S., 189 U. S. 103. In each of them the court held that the language of the grant there under consideration *prohibited* a withdrawal of the idemnity land, and that withdrawals of such lands, attempted to be made in violation of such prohibition, were void.

The reason for this is that the court construed the words "the lands hereby granted" in the acts there in question to be limited in their application to lands within the original or "place" limits," and, in the opinion in the latter case, the amendment of March 3, 1853 (10 Stat. 244) to the pre-emption law of 1841, is discussed and a partial list was given of rail-

road land grants in which the limitation, which was held in those cases decisive, occurred.

The difference between the language of those grants and that here under consideration, and its significance, is so apparent as to need no comment.

We therefore contend that, because of the executive withdrawal of the land, which was *never* revoked or abrogated as to this tract, the plaintiff in error never acquired any vested right therein by his occupancy thereof, *and cannot be heard to question the Ireland title in this case.*

In Hamblin v. Western Land Co., 147 U. S. 531, where land was similarly withdrawn, this court said:

"As, therefore, the land was so situated that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government."

See also

Bullard v. T. T. Co., 122 U. S. 167.

Bohal v. Dilla, 114 U. S. 49.

Spencer v. McDougal, *supra.*

But, irrespective of the unrevoked executive withdrawal, we contend that, under the provisions of the act of March 3, 1887, said Ireland had a vested right to the land, growing out of his contract with the railway company of March 30th, 1883, which became perfect October 23rd, 1896—when the railroad selections were cancelled—and which was paramount to any right the plaintiff in error could acquire by his settlement commencing in 1891.

Secretary Noble, in his order of December 19, 1890, to the commissioner (11 L. D. 607-610), discussed the section under consideration and its provisos, with reference to the Omaha grant, and said:

"In your letter of February 14th, you also call attention to the fact that the departmental instructions, approving the final adjustment of the Omaha grant and directing the restoration of the surplus lands to the public domain, *made no provision for the protection of purchasers from the company under said section and act;* and you invite attention to the conflicts likely to arise between the claims of such purchasers and those of parties claiming as settlers. It is suggested that a time be fixed within which purchasers under said act should be required to come forward and make proof, and otherwise comply with the requirements thereof. I have no doubt of my authority, in the administration of the law, to make such a requirement, and approve of your suggestion to that effect." He then directed that such purchasers be given 90 days notice to come in and avail themselves of their preference right, and that the restoration of the land to the public domain under his former order be suspended until such time had elapsed.

Union Colony v. Fulunte, 16 L. D. 273.

"The right of purchase under said section is not defeated by an adverse settlement, made after the passage of the act." (Sec. Smith).

Yocum v. Keystone Lumber Co., 22 L. D. 558.

"The right of one who purchased land from a railroad company, prior to the passage of the act of March 3, 1887, to perfect title under section 5 of said act, is superior to the settlement right of another, acquired after the passage of said act."

Skinvik v. Longstreet, Id. 32.

Jenkins v. Dreyfus, 19 L. D. 272.

Union Pac. Ry. Co. v. Norton, Id. 524.

This section was adopted solely as a relief measure. It is retrospective and not prospective in its operation; its design is remedial, not originative, and it is therefore within the rule that remedial statutes are to be liberally construed with a view to affording the intended relief. Such has been the uniform practice of the officers of the land department since its enactment.

The 5th section of the act of 1887 recognized and provided for a class of claimants for lands of the character to which it applied, whose rights could not be affected by subsequent settlement of others upon the lands, even if there were no withdrawal. Lands affected with the conditions mentioned, were appropriated by the terms of that section to this class of claimants. The right of purchase conferred by that act, thus absolute in its terms, was indivestable by one who went upon the land after 1887, whether before or after the railroad claim was cancelled—unless the railroad contractee should lose by laches his prior right thus conferred.

It is evident that congress understood and intended that the rights given by this act to its beneficia-

ries would take precedence over the rights of settlers under the homestead and pre-emption law; and, by the provisos of section 5, sought to protect certain claimants under those laws from its operation. By the first proviso it exempted from the priority given to purchasers, all bona fide homestead or pre-emption claimants who were occupying the lands *at the time the contract with the railway company was made;* and, by the second proviso, all lands were excepted, which were settled upon by homestead or pre-emption claimants, subsequent to December 1, 1882, and prior to the passage of the act. Having *excepted* from the operation of the act these *two* specific classes of homestead and pre-emption claimants, it necessarily left all *others subject* to its provisions.

These provisions were engrafted upon the pre-existing land grnat acts, and all persons who came within its terms were given rights which, upon the cancellation of the railroad grants, took effect, by relation, as of the date of the contract made with the railway companies. After the passage of that act, the cancellation of the railway companies' rights to the lands included in any such grant would not restore such lands to the public domain, as against such purchasers.

There were no settlers on this land at the date of the Ireland contract or at the time of the enactment of the law of 1887; so that there was no obstacle to such disposition of it as the government—its absolute owner—saw fit to make.

The plaintiff in error, who settled upon the land

in 1891, and did not offer a filing until 1895, could hardly expect priority over a purchaser from the railway company whose contract was made March 30th, 1883.

III.

WAS SAID IRELAND A PURCHASER IN GOOD FAITH WITHIN THE INTENT OF THE ACT OF 1887?

THIS INVOLVES FIRST, A CONSIDERATION OF THE CONSTRUCTION OF THE ACT OF 1887.

The subject has come before the land department several times since the passage of the act in 1887, and our contention is in harmony with the uniform rulings of the department.

An examination of some of the cases in which relief under this section has been sought and obtained in the land department by claimants, and a comparison of the character of the contracts therein involved with the contract in question here, will be instructive.

The case of Samuel L. Campbell, 12 L. D. 247, appears to be the first reported in the published decisions of the department.

The "contract" in that case was not given in the decision, but the record shows it as follows:

"Circular relating to the lands of the Southern Minnesota Railway Company.

By an act of congress, approved July 4th, 1866, entitled "An act making an additional grant of lands

to the state of Minnesota, in alternate sections, to aid in the construction of railroads in said State," certain lands were granted to the state of Minnesota for the purpose of aiding in the construction of a railroad from Houston, in Houston county (at the time the western terminus of the Southern Minnesota railroad), to the west line of the state. By an act of the legislature approved February 25, 1867, the state accepted the trust created by this act of congress, and granted the lands to the Southern Minnesota Railroad Company.

The Southern Minnesota Railroad Company, having failed to complete its road within the time prescribed by the acts of congress and of the state legislature, such of the lands as have not been acquired by that company by the completion of a portion of its line, were, by an act of the legislature of Minnesota, approved March 6th, 1878, transferred and granted to the Southern Minnesota Railway Extension Company, on the condition of the completion of the line of road of that company to Fairmont, in Martin county, before September 1st, 1878, and to Jackson, in Jackson county, before the end of the year 1879, and to the west line of the state before the end of the year 1889. This company is now engaged in the construction of its line of railroad, and completed the first section, from Winnebago City (the terminus of the Southern Minnesota Railway) to Jaskson, on December 2nd, 1878, and intends to build to the west line of the tate during the year 1879.

By the completion of its line to Jackson, the com-

pany became entitled, under the before mentioned acts of congress and the state legislature, to about 40,000 acres of land in Martin and Jackson counties; and, by extending to the west line of the state, it will become entitled to about 139,000 acres, situated in Rock, Murray and Pipestone counties; but, until the lands are absolutely conveyed by the United States to the state of Minnesota, and by the state to the company, there will remain a doubt as to the eventual acquirement of the lands by the company—a doubt based upon the fear that some technicality may cause the lands to be withheld by the general government; and, while the company, in the belief that it will secure an unquestionable title to the lands at an early date is, in good faith, complying with the terms of the several acts relating thereto, it must be clearly understood by all persons desiring to settle on the lands under the terms herein proposed, that the company may possibly fail to secure title; and that, in such event, settlers will be obliged to protect themselves by pre-emption or homestead entry or otherwise.

In order that the settlement of these lands may not be delayed, the company will issue permits to parties desiring to enter upon them and commence improvements. These permits will entitle the parties to the lands from the company, on the terms herein proposed, on its securing title thereto, on condition that they shall, in good faith, commence improvements at once, and shall put under cultivation within twelve months from the date of the permit, at least forty per cent of the lands taken; and

that they shall, within sixty days after receiving notice from the land commissioner of the company that the company has secured title to and is ready to make a formal contract or deed of the lands, make such payments as may then be due on the lands, and execute contracts or notes and mortgages to secure the deferred payments, as hereinafter provided.

The company reserves the right to revoke, without notice, any permit which may have been issued, in case of non-compliance with these conditions; and, in case of the failure of the company to obtain title, then this permit is to be void and of no effect.

To secure the immediate settlement and cultivation of the lands, the company offers them on the following easy terms:

Payments will, as a rule, be required at the rate of one dollar per acre, per annum, with interest on deferred payments, at the rate of seven per cent. per annum, payable annually.

"Interest."

"(Interest to be settled at the General Office S. M. Ry. Co., M. Conant), and the first payment of principal and interest will be due one year thereafter, but no payment of principal or interest will be required until the company is able to convey the lands by warranty deeds.

Special credits will be given as follows: For all lands broken by the 15th day of July, inst., after permit, a credit at the rate of $2.50 per acre of land broken. For all lands seeded in grain prior to July 1st 1881, an additional credit of 50 cents per acre will be given, but this will not apply to a second

seeding of the same land. These credits will be applied, as far as they will go, on the first payments due on the lands, principal and interest.

Right of way and the necessary additional ground for the erection of screens for protection against snow will be reserved for the Southern Minnesota Railway Extension Company.

Further information may be obtained on application to the undersigned,

MARSHALL CONANT,
Land Commissioner."

La Cross, Wis., March, 1879.

"Southern Minnesota Railway Extension Company Eastern Division.

Permit.

No.....

Mr. S. L. Campbell having applied for this permit (as appears by his signature hereto) the Southern Minnesota Railway Extension Company hereby authorizes him to enter upon and improve the whole of section No. one, of township No. one hundred and two, of range No. thirty-two, in Martin county, Minnesota, in accordance with and subject to the terms and conditions of the foregoing circular, which is hereby made a part of this permit.

The price fixed upon the tract described herein is seven dollars per acre. In case of compliance with the terms of this permit and of said circular, and in case the said company obtains title to said land, the same will be conveyed to said S. L. Campbell by warranty deed; but in case of failure on his part to comply with the same, then these presents shall be

deemed and construed to have been a lease, and to have created the relation of landlord and tenant in respect to said land; that is to say, between the said company, as lessor, and the above named applicant, as a tenant holding over after expiration of his term, and of his right to do so; and the said company may thereupon accordingly take possession of said land and any improvements thereon by summary proceedings, pursuant to statute as for unlawful holding over and detention of the same after the expiration of such lease, and may do so with or without prior notice, saving to him, however, permission to remove any growing crops put upon the ground by him, and to enter upon the premises at reasonable times for that purpose only. Right of way, as per first page, reserved.

In witness whereof, the said company has executed these presents by its land commissioner, and the said applicant has also subscribed the same.

Dated May 2nd, 1879.

(Signed) S. L. Campbell, Applicant.

The Southern Minnesota Railway Extension Company.

(Signed) By M. Conant, Land Commissioner."

Signed in Duplicate.

Hon. S. M. Stockslager, then acting commissioner of the general land office, submitted Campbell's application to purchase under this contract, to the secretary of the interior, whereupon that officer gave directions as to method of procedure under the act of March 3, 1887 (8 L. D. 27).

In due time Campbell submitted his proof, consisting in part of a copy of the foregoing agreement, which was duly examined by the commissioner who, after some additional evidence had been furnished pursuant to his request, transmitted the papers to the secretary of the interior, with a report containing the following recommendation:

"In response to this requirement copies of papers were forwarded to this office tending to show that on May 2, 1879, the railway company issued a permit to Campbell to enter upon and improve all of section 1, T. 102 N., R. 32 W., agreeing to sell to him for seven dollars per acre, with certain drawbacks or credits for breaking and seeding to be done within prescribed periods, so much of said section as the company should eventually acquire title to; it being understood and agreed by the parties that, if the company should fail to acquire title to any portion of said section, Campbell should protect his interest in or improvements upon such portions by entries under the public land laws; and that if Campbell should fail within sixty days after receiving notice from the land commissioner of the company that the company has secured title to, and is ready to make formal contract of sale or deed of the lands, to make such payments as may then be due on the lands and execute notes or mortgages to secure the deferred payments, then these presents shall be deemed to have created the relation of landlord and tenant in respect to said land and the improvements thereon.

"No payment of any kind was to be made by

Campbell to the company until the company should be able to convey the lands by warranty deed, and by the terms of the permit, the company reserved the right to revoke the same, without notice, in case of non-compliance with its conditions. It was also provided that in case of failure of the company to obtain title, then this permit is to be void and of no effect.

"The company acquired title in 1880 to all of said section except the tracts embraced in Campbell's entry, and, on January 3, 1881, two formal contracts of sale embracing the N. ½ and N. ½ S. W. ¼ of the section were executed by and between Campbell and the company, and he surrendered the permit issued to him in 1879, but the same does not appear to have been cancelled upon the company's books, and it was understood that, should the company acquire title to the remainder of the section, Campbell should be allowed to purchase the same, but no writing to that effect was made.

"Upon receiving the permit Campbell took possession of the entire section and made extensive improvements thereon, the entire S. ½ S. W. ¼ and about thirty-five acres of the S. E. ¼ having been broken by him. He made no payment on these tracts, and the land commissioner of the company certifies that no credit for the breaking done thereon have been allowed him.

"The 5th section of the act of March 3, 1887, is a relief statute and should be liberally construed so that it may not fail in its object, and that equitable rights may be protected.

"The word sold as used in said section, is, in my opinion, intended to embrace all bona fide transactions between individuals and the company contemplating either a present or future actual transfer of title, and the arrangement entered into by and between Campbell and the company in 1879, and verbally renewed in 1881, is such as to bring the transaction within the intention, and constitute a sale within the meaning of the 5th section of the act of March 3, 1887."

Upon consideration of this report, and the proof submitted by Campbell, the secretary concurred in the opinion expressed by the commissioner and decided that the agreement between Campbell and the company was such as to bring Campbell within the intent of the act, and, therefore, allowed him to purchase the land thereunder. (See 12 L. D. 247.)

Plaintiff-in-error assails the Ireland contract of March 30, 1883, as being a mere option, without mutuality or consideration, entered into with full knowledge that the company had not the title.

In the light of the Campbell contract—fairly bristling with information that the company did not own, and might never acquire, title to the land embraced therein; and expressing in almost every line the doubt that title would ever come to the company; declaring over and over again that it was a mere permit to settle, and not a contract of sale—a mere promise by the company that upon the oc-

currence of certain events it would sell the land to Campbell, but in no way binding Campbell to buy—we cannot see how the sufficiency of the Ireland contract can be assailed, if the Campbell case was correctly decided.

In the Campbell contract it expressly declared that no consideration should be paid until the company was prepared to make good title; then the piece was to be $7.00 per acre, with allowances—in certain cases—amounting to $3.00 per acre, leaving the net price only $4.00 per acre. In Ireland's case the company accepted services previously rendered in placing settlers upon its land as sufficient consideration for the privileges granted him (and they were of a kind with the services for which Campbell was to receive credits) and the price ultimately to be paid by Ireland is specifically stated at $4.00 per acre, with a discount of 10 per cent at time of payment. If the consideration in the Campbell case was sufficient, and that counsel concedes, it is difficult to see wherein that in the case of Ireland is deficient.

The entire record in the above case has been given in full because of its striking similarity to this, and because the policy of liberal construction, which the department has consistently presented in all cases arising under this law, was therein first promulgated.

In numerous other cases agreements in all essential features similar to that here in question, have been considered and upheld by the department as

sufficient under the act.

Telford vs. Keystone Lumber Co., 18 L. D. 176, and 19 L. D. 141.

Union Pacific Railway Company vs. Norton, 17 L. D. 314;

Jenkins v. Dreyfus, 19 L. D. 272.

Holton v. Rutledge, 20 L. D. 227.

Stephan v. Morris, 21 L. D. 557.

Austin v. Luey, 21 L. D. 507.

The special attention of the court is respectfully invited to the case last cited, wherein Mrs. Austin was permitted to make purchase under this law, although it does not affirmatively appear that any written contract was executed between her and the railway company, and it was shown that on numerous occasions the company had refused to convey the land and informed her that it did not own the same. Commenting on this case, the Secretary of the Interior (p. 511) used the language respecting the spirit and intent of the act of 1887 and the sufficiency of contracts thereunder as follows:

"When we come to consider the spirit and purpose of the act of March 3, 1887, I think it will be apparent that it was intended to cover contracts other than those evidenced by a deed, since it applies exclusively to lands sold or contracted away by railroad companies *before such companies had themselves obtained title or patent*, obviously the terms "*purchase and sale*," as used in said act, are not to be understood in their technical and limited meaning; but rather in their widest and most comprehensive meaning; which would, I think, include such contracts for the sale of lands as had been performed in whole or in part by the purchaser; or as

had resulted in the occupancy and improvement of the lands, no matter how the contracts were evidenced, so that they were clearly and satisfactorily proven. Certainly, congress did not proceed upon the idea that the companies, as a rule, would execute deeds before they obtained patents; nor did they intend to exclude from the provisions of the act all contracts with reference to sales, which were not evidenced by the execution of a deed."

In the case of Grandin et al. v. La Bar, 23 L. D. 301, the secretary says:

"Purchase, in its broad and liberal sense, includes every mode of acquisition save that of descent, and, in the most narrow sense in which it was ever employed, it means acquisition by the payment of a price of money. But neither of these is the popular sense. In common use, and generally in statutes, as the supreme court says, "the word is employed in a sense not technical, only as meaning acquisition by contract between the parties." (91 U. S. 374.)

It is inconceivable that, in this remedial act, the word is used in the restricted sense contended for by counsel. On the contrary, it cannot be doubted that the object was to protect all persons who had parted with a valuable consideration, whether in money or other property, in consideration of the transfer of lands for which the company could not and did not pass valid title. This construction gives effect to the undoubted purpose of congress, and is not inconsistent with any canon of interpretation. The provisions of the act apply to indemnity, as well as place lands.

Durrell vs. Windom, 23 L. D. 508.

Where a party bargains for property which he knows the other party does not own at the time, and the subsequent acquisition of which depends upon a contingency, he cannot be what, within the strict terms of the law, would be called a "bona fide purchaser." He has notice of the defect in the title. For the reasons stated by this court in U. S. vs. Ry. Co., 165 U. S. 463, it is clear that the term "bona fide purchaser", as used in this statute, is not to be taken in its strict or literal sense. It is intended rather to indicate one who made a contract, intending to purchase and expecting to get the title in that way.

In view of the liberal construction uniformly placed upon this section by the land department, and the large number of cases in which contracts like that in the Campbell case have been upheld, it is worthy of consideration that counsel for plaintiff-in-error are not able to direct the attention of the court to any decision of either a state or federal court, holding that such broad and liberal construction of this law by the land department was erroneous; or any case where a decision of the land department in favor of a purchaser under this law, has afterwards been overturned in the courts. A long and uniform course of construction of a statute by the tribunal expressly charged with its administration, is entitled to great respect.

In U. S. vs. Moore, 95 U. S. 760, this court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to

the most respectful consideration and ought not to be overruled without cogent reason. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." (See also Brown vs. U. S. 113 U. S. 568 (571); U. S. vs. Railway Co., 98 U. S. 334-341; Ry. Co. vs. Ry. Co., 112 U. S. 414-418.)

Counsel for plaintiff-in-error contend for a *strict construction* of this section, and insist that no one should be considered a purchaser thereunder, *unless his contract is one that could be specifically enforced in the courts.* They devote over fifty pages of their brief to the citation and discussion of cases where various contracts have been held defective and insufficient, as between the parties in actions brought for their enforcement. These are all cases to compel a performance of a contract by an unwilling party; such a case presents the severest test to which a contract can be subjected, and the courts in such cases apply the rule of strictest construction.

This is a case where the contract involved has been voluntarily executed, and the plaintiff-in-error in effect asks that the performance be set aside; upon the asserted ground that the contract could not have been specifically enforced had the parties refused to comply with its terms. When this contract was made the only parties interested were said Ireland and the railway company. They both treated it as valid, and have complied with its terms. He by selecting the land in small

tracts, and selling the same to his vendees; the railway company, accepting this as performance on his part, designated all of these lands on their plats and maps as "Ireland lands." It is plain that thereby these lands were "appropriated" to the Ireland contract, long before plaintiff-in-error settled thereon. If the rights of the parties depended upon the contract as originally made, without anything having been done thereunder, by either Ireland or the railway company, it might be subject to many of the criticisms urged against it. But, if it was but an "option" at the beginning and lacked a sufficient description of the lands intended to be covered thereby, these elements of uncertainty were removed when the lands were afterwards selected, and sold by said Ireland with the knowledge of the company.

After the railway company's selections were cancelled the only parties interested in the contract were said Ireland and the government, and here again both parties were satisfied with it, and accepted it as sufficient.

We insist that no fair construction of the contract is possible that does not take into consideration not only the terms of the contract itself, but the circumstances in which it was made; the things that have been done by both parties in performance of its terms and conditions, and the construction and interpretation put upon it by the parties themselves, by their subsequent acts and dealings thereunder. We have seen that said Ireland, with the knowledge

and approval of the railroad company, proceeded to advertise and to procure settlers and make sales of the land and long before the plaintiff-in-error attempted to make homestead entry had disposed of all of said lands and issued contracts binding himself to give title to his vendees, upon conditions therein stated.

At the time when plaintiff-in-error claims to have acquired rights to this land, the contract between said Ireland and the railway company had been so far executed that neither party to it could escape from the full performance if the railroad company had obtained title to the land. Said Ireland had bound himself by all the contracts to his vendees to furnish them with title; so that the claim of counsel for plaintiff-in-error that said Ireland was so situated that he was under no obligation to perform this contract if the railway company had acquired the land, is entirely unfounded. No better evidence of the good faith of both said Ireland and the railway company in entering into the original contract could be furnished than is afforded by their subsequent transactions above outlined. These facts all appeared in evidence before the land department.

The right of the parties to a contract to place a practical construction thereon and to give it an interpretation, is so well recognized that we cite but few authorities.

In Reissner v. Oxley, 80 Ind. 580, the court says, "The rights of parties to put an interpretation up-

on their contracts even to the extent of doing away practically with the ordinary and plain meaning of terms, cannot well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful and the cases are numerous and consistent, which permit a resort by the proof of the circumstances or situation of the parties when their contract was made and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and when this is done, the question must be left to the decision of the jury."

An interesting opinion on this question of the interpretation of contracts by the practical construction placed thereon by the parties, is that delivered by Judge Bliss in St. Louis Gas Light Co. v. City of St. Louis, 46 Mo. 121, where the question was whether a contract between the parties (which provided specifically for 263 lamps and, in respect to prices, stated that the same was to govern lamps "herein contracted for") should be construed to mean that the price should relate to all lamps, the same as if they had used the phrase "herein provided for," instead of "herein contracted for," the latter construction was given to the contract as being evidently what was intended by the parties, instead of what they had expressly provided, the court saying:

"Our daily experience impresses us with the imperfection of common language, and shows the errors into which we contsantly stumble in the use of the most important medium we possess for the communication of ideas. Such is the indefiniteness of words and phrases in daily use, and of so many meanings and shades of meanings are they susceptible, according to their arrangement, application,

figurative or provincial use, or the different ideas attached to them on different occasions, that no science or special art can be taught, and no mechanical occupation can be prosecuted, without the precision of technical terms and phrases.

"And if simple words and phrases so fail to communicate ideas with accuracy and precision, so much more may parties to a long and complicated agreement not only fail to understand it alike, as is shown by every day's disputes, but if they agree in its meaning, they may give it an interpretation different from that which the court, accustomed to greater precision of language, would consider the most natural. In a case of that kind whose interpretation should prevail? If the court gives one differing from that understood by the parties, it in effect makes a new agreement—the very thing most to be avoided. If it leaves the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice."

In the opinion the court cites the case of Patterson v. Camden, 25 Mo. 13, where the court say:

"The practical construction of the notice, given by the parties themselves, or the acts of the parties in regard to the subject matter under the notice, may be properly looked to, properly taken into consideration, in order to ascertain what meaning the parties intended to attach to the instrument. This practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than what is th eabstract meaning which this court may attach to its mere phraseology."

Also the case of Whitehead v. Bank of Pittsburgh, 2 Watts & Serg. 172, where the court said: "I know of no better mode of ascertaining this

meaning than is shown if all parties acted on a particular meaning."

Also Chapman v. Bluck, 5 Scott C. P. 515, where the question was whether a certain agreement constituted a lease or only an agreement to lease; and the court not only considered the correspondence making the alleged demise, but also subsequent acts and declarations of the tenant; saying, through Tyndall, J.—"But we are also at liberty to look at the acts of the parties, than which there cannot be a better means of ascertaining their intention;" and Parker, J., after stating the general rule as given by Lord Ellenborough, "that the intention of the parties as declared by the words of the instrument must govern the construction," adds "the subsequent acts and declarations of the parties may be looked to in aid of the construction."

"Where the language of a contract is equivocal in *itself, or is made so by proof of extrinsic circumstances*, so that it is susceptible of more than one construction, oral evidence is competent to show the situation of the parties and to enable the court to be surrounded by the same circumstances as the parties were, and to look at the contract in the same light as they did, and thus to aid the court in applying and construing the language of the contract."

Brown v. Fales, 139 Mass. 21 S. C. 29 N. E. Rep., 211.

Chief Justice Marshall, in Etting v. Bank, 11 Wheat. 59, states the law as follows: "Although it is the province of the court to construe written instruments, yet where the effect of such instruments

depends, not merely on the construction and meaning of the instrument, but upon collateral facts in pais, the extrinsic circumstances, and inferences of fact to be drawn from them are to be left to the jury."

In West v. Smith, 101 U. S. 270, the doctrine is thus expressed:

"Doubtless the general rule is that it is the province of the court to construe written instruments, but it is equally well settled that when the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inference of fact to be drawn from the paper must be left to the jury; or, in other words, when the effect of a written instrument collaterally introduced in evidence depends not merely on the construction and meaning, but also on extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation."

"Where the intention is obscure or doubtful, and extrinsic evidence can be invoked, no evidence is more reliable or entitled to greater consideration as manifesting what their intention was, than the acts and conduct of the parties themselves."

Citizens Fire Ins. Co. v. Doll, 35 Md. 107.

"When the intent of the parties is doubtful, the construction upon it by the manner in which it has been executed by both or one with the express or implied assent of the other, furnishes a rule for its interpretation."

Williams v. McHatten, 16 La. An. 196.

When there is any ambiguity, construction by acts of the parties will prevail when not wholly at variance with correct legal interpretation."

Matthews v. Danahy, 26 Mo. App. 660.

In Topliff v. Topliff, 122 U. S. 121, the question was as to whether the contract made by the parties in 1870 continued more than five years, and to what articles it applied. It was shown that the parties acted under it after that date, with reference to the articles in question. The court says:

"The operations of the parties in the manufacture and sale of the article were carried on and continued to enlarge and prosper and became profitable, and the parties thereto acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising from the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

We respectfully submit that the opinion of the Supreme Court of Minnesota on the three controlling points of the case is well supported by the authorities, and by the manifest merits, and the judgment should be affirmed.

1. The decision of the Land Department as to Ireland's qualifications to make entry under the 5th section of the law of 1887, was the decision of a question of FACT.

2. By reason of the clear priority of Ireland's right under the law of 1887, and the duty of the land department to determine that right before the claim of any homesteader could be considered, and for the further reason that in the consideration of this inherently prior right the land department found as a fact that Ireland was fully qualified and his entry under the 5th section of the law of 1887 was allowed, —the plaintiff in error never acquired such a right in the land by his occupancy and his tardy homestead application, as to be in a position to call in question the action of the government in disposing of its land to Ireland.

Counsel for plaintiff in error entirely overlook the priority of the right of a "purchaser" under this act, over a homesteader, notwithstanding its plain terms, and the uniform construction thereof by the Land Department. Counsel seem to contend that the claim of such a purchaser, ought to be looked upon with disfavor, and defeated if any excuse for so doing could be found. If the congress wished such claims defeated it never would have passed this remedial law.

The undertaking of Archbishop Ireland under his contracts with the railway company, was not in its nature speculative but philanthropical. It was not a scheme to withhold from settlement any portion of

the public domain, but rather a benevolent attempt to promote settlement and to secure homes at a nominal cost for actual settlers on a part of the public domain, which was at the time closed to settlement under the homestead or pre-emption laws. When an appeal is made on behalf of the homes and families of settlers, it must be borne in mind that there were many more homes established on these lands under the provisions of this law of 1887, than could now be established by passing over Ireland's title to these few squatters. Ireland and his grantees paid a price for this land, and plaintiff in error is attempting in this action to have the title acquired and paid for by Ireland passed over to him in this action, without even offering to repay the amount paid to the government for the land. Plaintiff in error is not asking that Ireland's title be cancelled, but that it be decreed to be held in trust for his benefit.

The undertaking of Ireland was a great and creditable enterprise, and the colony established by him on these lands has flourished and built up the country. Instead of being treated with disfavor, we believe it is entitled to the most favorable consideration, and that seems to have been the view of every tribunal before which the question has been brought in this long litigation.

3. The contract between Ireland and the railway company, with the construction placed upon it by the parties, substantially executed as it was at the time of the cancellation of the railroad selections, brought him—under his second contract,—and his vendees—

under his first contract,—clearly within the intent and meaning of the 5th section of the act of 1887, as bona fide purchasers of the lands from the railroad company.

Respectfully submitted,

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STEVENS, O'BRIEN, COLE & ALBRECHT,
Attorneys for Defendant in Error.

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[illegible]

No. 55.

JACOB GEETGENS, Plaintiff in Error,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR SUBMITTED BY KERAN J. O'BRIEN, COUNSEL.

E. T. Young and
Stevens, O'Brien, Cole & Aldrich,
Attorneys for Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C. [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Believing that every question arising upon this writ of error has been conclusively settled by recent decisions of this court, and that, because of the conclusions reached in some of them, it is important to the interests we represent that the radical difference between the acts then construed and that affecting the case at bar be kept clearly and steadily in view, we have asked leave to supplement the brief heretofore filed with a few additional citations and suggestions

This course is perhaps also justified by the complexity of the "stipulation of facts" (Record, fol. 95–181), which pur-

ports, in some places, to recite certain events as *facts*, as at folio 95, where the following occurs:

"THAT SAID TRACT WITH OTHER LANDS WAS WITHDRAWN FROM SETTLEMENT AND ENTRY UNDER THE LAWS OF THE UNITED STATES BY EXECUTIVE WITHDRAWAL DATED MAY 25, 1869."

Then follow statements of the filing by the railway company with the proper officers, on April 22, 1885, of selections of these lands as indemnity lands to compensate it for losses along its main line; the action of the various officers of the Department from time to time, and then the statement that "the cancellation of all said selections was declared to be final by the said Commissioner of the General Land Office by his letter of October 23, 1896."

Every fact essential to plaintiff's cause of action, including the payment by him to the government of $1.25 per acre for the land, is stated in the stipulation *as a fact*, and yet counsel are controverting each of those propositions upon this argument.

But as to other matters there is much indefiniteness. For instance, in other places the stipulation recites the testimony given and proceedings had in the Land Department upon the successive hearings, varied occasionally by the introduction of a document like the stipulation embodied at folios 128, 129, from which appear, among other things, the *belief* by the defendant, on the one hand, and the *denial* by the plaintiff, on the other hand, that the defendant and his coadjutors had valid claims; and by an admission that those of them who had contracts from the grantor of the defendant in error and yet litigated with him were doing so upon the advice of counsel to the effect that neither he nor the railway company had or could secure title; and stipulating also that the rest of them, including

plaintiff in error, when they made their respective applications, or made settlements on the land, *knew* "*that the said tracts were then under a withdrawal* for railroad purposes under claims by the railway company as indemnity lands."

To add to the confusion, instead of excluding what was deemed inadmissible and having the rest of the testimony read to the reporter, so that it might appear as testimony taken upon the trial of *this action*, the transcript of the testimony presented before the Land Department appears in the record, interspersed with rulings of the trial judge, so that he appears to rule upon testimony which was not given in his court.

This judicial novelty culminates in a document entitled "Findings and Decision," the "Findings" being as follows:

"First" (the reasonably safe assertion), "that each and every *fact* set forth in said stipulation of *facts* (Exhibit 2) is *true*. Second, that each and every allegation of the pleadings, except as '*set forth*' in said stipulation, or admitted in the pleadings, is false and untrue."

In these conditions we think it inevitably follows, under the decisions hereinafter cited, that this court can predicate nothing upon these alleged "findings of fact," and that the sole question for consideration is whether in any circumstances, the existence of which this court has a right to presume, the Land Department would have been justified in awarding the land as it did, and that such question must be answered by affirmance of the judgment below.

ARGUMENT.

I.

THIS COURT WILL NOT REVIEW FACTS ESTABLISHED BY TWO CONCURRENT DECISIONS OF COURTS BELOW.

In Hyde *vs.* Booraem, 16 Pet., 169, where the question was as to the liability of a party to an alleged agreement to hold certain notes deposited with him until certain conditions were fulfilled, and then until they should be paid in a specific way, and against the makers of the notes, the defendants inserting separately, set up the conditions above referred to and their non-performance by the plaintiff intends exemption from liability on that ground. The trial court, holding the contract to be valid and binding, ordered judgment for the balance due thereunder. The opinion of this court was delivered by Mr. Justice Story, who said:

"One of the embarrassments attendant upon the examination of this cause in this court, is from the manner in which the proceedings were had in the court below. We have no authority, as an appellate court upon a writ of error to revise the evidence in the court below. In order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it, we can only re-examine the law so far as pronounced upon a statement of facts and not merely a statement of the evidence of facts found in the record in the nature of a special verdict or an agreed case."

In Parks *vs.* Turner, 12 How., 39, the action was brought upon an indorsement of a promissory note. The defendant pleaded want of consideration, and that the instrument was a *nudum pactum* and void. There was a verdict for plaintiff and judgment entered thereon, and the case was brought

here upon writ of error. The opinion was delivered by Chief Justice Taney, who said:

"We certainly cannot adopt in this court the practice and mode of proceding in the appellate court of Louisiana; for a writ of error can bring up to this court nothing but questions of law."

And further (pp. 46 and 47):

"the second objection taken by the plaintiff in error (failure to produce the reasons for the judgment). Such a provision is inconsistent with the practice and mode of proceeding in the courts of the United States; for the reason upon which the opinion of an inferior court is founded forms no part of the record when a case is brought by writ of error."

In Lehnen *vs.* Dickson, 148 U. S., 71, the court held that mere recital of the testimony in the opinion of the trial court or in the bill of exceptions is not such special finding of facts as alone authorizes this court to review the rulings of the lower court; that the words "The district judge, after stating the facts as above, filed a statement preliminary to the opinion proper," did not constitute such statement and finding of facts by the judge. This court also held that the conclusion reached by the trial judge, that "the lease in question never was a valid instrument did not change the situation. It did not create it, only established the fact, and the affirmance of the decree was a final adjudication that from the first it was not binding. Certainly, in the absence of a finding to the contrary, we should not feel warranted from an examination of the testimony in coming to the conclusion that the acts of the defendant were characterized by good faith."

In Lloyd *vs.* Matthews, 155 U. S., 222, this court says:

"In the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was the matter of fact in the State court whose judgment or decree is under review, is a matter of fact there."

In Grayson *vs.* Lynch, 163 U. S., 468, the case was tried in the lower court without a jury and the decision and judgment of the trial court were affirmed by the territorial supreme court of New Mexico. There were fifty-three assignments of error taken to the introduction of testimony and to the finding of the principal facts. This court said:

"So far as this class of cases is concerned, they are left to be determined by the legal principles applicable to them in other jurisdictions; and, as regards the Federal practice, this court has held in a series of cases that the special finding of facts referred to in the acts allowing parties to submit issues of facts in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of fact be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury."

Morris *vs.* Jackson, 9 Wall., 125.
Kearney *vs.* Case, 12 Wall., 275.
Miller *vs.* Insurance Co., *id.*, 385.
Insurance Co. *vs.* Folsom, 18 Wall., 237.
Insurance Co. *vs.* Sea, 21 Wall., 158.
Jennisons *vs.* Leonard, *id.*, 302.
Tying *vs.* Grinnell, 92 U. S., 467.
Insurance Co. *vs.* Boon, 95 U. S., 117.
The Abbotsford, 98 U. S., 440.

In Egan *vs.* Hart, 165 U. S., 188, the court say:

"On error to the state court the opinion of that court is to be treated as part of the record, and it may be examined in order to ascertain the questions presented, as may also be the entire record, if necessary, to throw light on the findings. The record before us contains 'all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the supreme court of Louisiana.'

"On error, however, to a state court this court cannot re-examine the evidence, and when the facts are found below

is concluded by such finding. We, however, conclude that not only the very nature of the writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, *when the facts are found by the court below, this court* is concluded by such findings."

In Thompson *vs.* Maxwell Land Grant Co., 168 U. S., 451–456, the opinion reads: "Whenever the case comes from the highest court of a state for review, and by statute or settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment," citing 125 U. S., 18 and 39.

In Hyde *vs.* Bishop Iron Co., 177 U. S., 281; 66 Minn., 24 (31), Mr. Justice Brewer, in delivering the opinion of the court, said:

"We are not called upon to determine whether every step in this protracted controversy was carried on with technical accuracy in the matter of procedure, and it may be, as counsel contend, that upon some of the motions and in some of the contests testimony was received which was not pertinent to that particular phase of the controversy, but it is quite evident that in one form or another, on some motion or another, in some stage of the proceedings, all the facts and claims of either party were fully presented, considered, and determined by the Department. This is not a case on error, in which the regularity of every step taken in the Land Department is to be considered and determined, and upon that inquiry judgment entered, affirming or reversing its decision, but it is an independent suit in the courts in which the inquiry is whether the parties to the proceedings in the Land Department had full and proper notice of those proceedings, whether the Department heard the claims and evidence offered by each party, and then whether upon the facts as found by it there was any error in matter of law in its decision. It may be remarked in passing that there is no allegation of corruption or perjury, or any of the grounds upon which sometimes a court of equity will set aside the conclusion of another tribu-

nal, even where the proceedings are regular in form. And, as it is evident from the showing made in the cross-petition that both parties were often and fully heard and no limitation placed upon their right to offer testimony, we must accept as conclusive the findings of fact made by the Department, and inquire simply whether the law was properly adjudged."

In Chin Bak Kan *vs.* United States, 186 U. S., 193, the court say:

"Except in cases where the question of jurisdiction alone is certified, we have the power to dispose of the entire case; but as the jurisdiction of the Commissioner is sustained, we are of opinion that we cannot properly re-examine the facts or determine by true judgment below that is the general rule, and there is nothing to take this case out of its operation."

II.

THE GRANT IN QUESTION (ACT OF MARCH 3, 1857, 11 STAT., 195) DIFFERS ENTIRELY FROM THOSE WHICH THIS COURT HAS BEEN CONSIDERING DURING THE LAST TEN YEARS.

The most important matter before the court is the question of the character of the original grant from the Government to the Territory and State of Minnesota. In the case of Oregon & C. & R. Co. *vs.* U. S., 189 U. S., 103, upon which plaintiff in error strongly relies, the court had under consideration a land grant act approved July 25, 1866 (14 Stat., 239), which is substantially the same as the others above referred to, but entirely unlike that now under consideration. To make the comparison easier, the two acts are given below.

That there be, and hereby is, granted to the *said companies*, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of *public land, not mineral*, designated by odd numbers, *to the amount of twenty alternate sections per mile* (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected *by said companies* in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from

That there be and is hereby granted to the *Territory of Minnesota*, for the purpose of aiding, etc., every alternate section of *land* designated by odd number for six sections in width on each side of each of said roads and branches. But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the *Governor of said Territory or future State* to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above *specified*, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which *lands* (THUS SELECTED IN LIEU OF THOSE SOLD, and to which pre-emption rights have attached as aforesaid, TOGETHER WITH THE SECTIONS AND PARTS OF SECTIONS designated by odd numbers as aforesaid, and appropriated as aforesaid) SHALL BE HELD BY THE TERRITORY OR FUTURE STATE

sale public lands *herein granted* on each side of said railroad, so far as located and within the limits before specified (July 25, 1866; California & Oregon R. R. Co., 14 Stat., 239).	OF MINNESOTA FOR THE USE AND PURPOSE AFORESAID (11 Stat., 195; ap. March 3, 1857).

Some of the differences are as follows:

First. The act of 1857 was made to the Territory and future State, while the act of 1866 was made to the company direct.

Second. The act of 1866 excludes mineral lands.

Third. The grant to Minnesota was six sections per mile on each side for a short distance, while that to the Oregon company was twenty, for a long distance.

Fourth. The act of 1857 provides that in case it shall appear that the United States have, when the lines or routes have been definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, it shall be lawful for an agent of the State to select indemnity lands. The act of 1866, without referring to any date, provides that—

"when any of said sections or parts shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands shall be selected *by said companies* in lieu of those lost, and as soon as the companies file a survey of not less than sixty miles, the Secretary was to withdraw from public sale the lands therein granted on each side of the railroad as far as located and within the limits before specified."

Fifth. The right was reserved to add to, alter, amend, or repeal the act of 1866.

Sixth. The pre-emption and homestead laws were expressly extended by the act of 1866.

Seventh. There is significant difference in the granting terms.

Thus the language of the grant in 1866 is:

"That there be and is hereby granted every alternate section of PUBLIC LAND, NOT MINERAL, designated by odd numbers, to the amount of ten sections per mile on each side per mile."

There is no provision that the title to any lands but those which shall remain "*public lands, not mineral*," undisposed of at the time of the filing of the survey, whether in place or indemnity, is to be granted to any one. The withdrawal is to be made by the Secretary when a survey is filed, and there is nothing whatever which purports to grant anything but lands in place.

But when you look at the act of 1857, these words, which do not appear in the other, are found:

"*Which lands* (THUS SELECTED IN LIEU OF THOSE SOLD and to which pre-emption rights have attached as aforesaid, TOGETHER WITH THE SECTIONS and parts of sections designated by odd numbers, as aforesaid, and appropriated, not "GRANTED," as aforesaid) ARE TO BE HELD BY THE TERRITORY OR FUTURE STATE OF MINNESOTA FOR THE USE AND PURPOSE AFORESAID."

It is further provided—

"That the lands hereby granted FOR AND ON ACCOUNT OF said roads and branches severally shall be exclusively applied in the construction of that road FOR AND ON ACCOUNT of which such lands are hereby granted."

Section 2 provides that the even-numbered sections—that is, the sections and parts of sections of land which by such

grant shall remain to the United States—within six miles on each side shall not be sold for less than double minimum price.

Section 3 provides that the SAID LANDS HEREBY GRANTED to the said Territory or future State shall be subject to the future disposal of the legislature, etc. If the indemnity lands are not "hereby granted," *they* are nowhere made "subject to future disposal."

Section 4 provides for the manner of their disposal as the road is constructed, and, in the first line, the language is "that the LANDS HEREBY GRANTED TO SAID TERRITORY."

The importance of these distinctions will appear when we come to consider the course of reasoning by which this court in the case first above mentioned arrived at its conclusion. It is well understood that, until the decision of Secretary Lamar, it was the general, if not the universal, understanding that withdrawals reserved the land from sale and from disposition of every kind, until the question of their applicability to the grant on account of which the withdrawal had been made was finally determined.

That doctrine, as our experienced and epigrammatic opponent says at page 33 of his brief, received "its first rude shock" in the Department, in the decision of Secretary Vilas, in the case of Northern Pacific R. R. Co. *vs.* Miller (7 L. D., 100), wherein he held that "the statutory withdrawal once exercised was exhausted and could not be repeated." And that, as a consequence, "a tract of land not within the limits of the statutory withdrawal on general route of 1870, but falling within the indemnity limits on definite location, was free from the operation of the grant, and subject to appropriation under the general land laws."

Having examined the language of each of the grants in the cases cited in the dissenting opinion in the case of Oregon and California *vs.* United States, 189, 103, which we understand to be the latest and authoritative pronouncement of this court upon the subject, we respectfully and with great deference submit whether it is not possible, if not entirely practicable, to reconcile the apparent conflict between the construction therein given to the Northern Pacific land grant with the entirely opposite rule previously applied to grants of the character of the one here in question. The grant here in question is substantially identical with those involved in the cases first above referred to.

In the case of Oregon, &c., R. R. *vs.* U. S., 189 U. S., 103, the court construed the act of July 25, 1866, 14 Stat., 239, the language of which is substantially identical with that of the Northern Pacific grant and of every other act which has been construed with the same result. The opinion is largely based upon the case of Nelson *vs.* N. P. Ry. Co., 188 U. S., 108, as *that* was upon the case of Hewitt *vs.* Schultz, 180 U. S., 139, in both of which the charter of the Northern Pacific Company was involved. The last-named case, upon the authority of which it was held in the Oregon case that it was beyond the power of the Secretary to withdraw lands within indemnity limits of the grant made by the act of 1866 to the Oregon Company, contains an elaborate discussion based upon the language of the third section of the Northern Pacific act, in respect whereof the opinion states (p. 146):

"That this section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress granted to the Northern Pacific Company, *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or rights *at the time this line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office,—lands that were, at that time, free from

pre-emption or other claims or rights, being excluded from the grant. * * * The cases all speak of the granted lands as those within the place limits."

After quoting the fourth section, providing for the appointment of examining commissioners and the issue of patents, the sixth section is quoted to the effect that the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line after the general route shall be fixed and as fast as may be required by construction, and then the following:

"And the odd sections of land HEREBY GRANTED shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

Then follows a clause providing that the pre-emption and homestead acts—

"SHALL BE, AND THE SAME ARE HEREBY, EXTENDED to all other lands on the line of said road when surveyed, except as is HEREBY GRANTED to said company. And the reserved alternate sections shall not be sold by the Government at a price less than $2.50 per acre when offered for sale."

The court then proceeds to state the contention that "construing the third and sixth sections again, it is clear that the words 'the odd sections of land hereby granted' in the first part, and the words 'excepting those hereby granted to the said company' in the latter part of the sixth section, refer to the lands described in the first section of the act; that is, to the odd-numbered sections in the place limits, which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to all other lands on the line of the said road when surveyed, the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of

1862, should extend to them; that "Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits to the road which were unappropriated when the line of the road was definitely fixed; and that if at the time such line was 'definitely fixed' it appeared that any of the lands granted—that is, lands in the place limits had been sold, granted, or otherwise appropriated—then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the sixth section of the Northern Pacific act, and the pre-emption and homestead acts, could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts."

The opinion in the Hewitt case proceeds to state that this construction of the Northern Pacific charter finds support in the joint resolution of May 31, 1870 (16 Stat., 378), authorizing the construction of the road through the valley of the Columbia and providing that—

"In the event of there not being in any State or Territory at the time of its final location therein the amount of land per mile granted to it within the prescribed limit, it should be entitled under the direction of the Secretary of the Interior to receive as many sections designated by odd numbers therein within ten miles on each side, beyond the prescribed limits, as would make up the deficiency, excepting mineral and other lands, as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July 2, 1864."

Thus providing a second indemnity limit for lands lost in the granted or place limit.

The opinion further states that the court do not find that the question of the power of the Secretary to withdraw lands within the indemnity limits of the Northern Pacific railroad was ever distinctly presented and disposed of prior to the year 1888, though mooted in respect to the Atlantic and Pacific grant (6 L. D., 84), wherein Secretary Lamar suggested that he should have doubt, if it were an original proposition, as to the legal authority of the Secretary to withdraw indemnity lands before ascertainment of definite losses, because the words of the act, "The odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act," indicate with most clearness the legislative will that no lands should be withdrawn, except odd-numbered sections, within the granted limits, as expressly designated in the act; but that when the next provision was considered, viz., that which extended the pre-emption and homestead laws to all "other lands on the line of said road when surveyed, excepting those hereby granted to said company," it was difficult to resist the conclusion that Congress intended that "all other lands excepting those hereby granted to said company" should be opened to settlement under the pre-emption and homestead laws, and to prohibit executive discretion.

The opinion in the Hewitt cases proceeds to state that in 1888 the question was directly presented to Secretary Vilas, in Northern Pacific Railroad Company *vs.* Miller, 7 L. D., 100, and that he held that the charter prohibited the withdrawal of any lands in the indemnity limits, and gave this reason: "As to the lands in the primary or granted limits: 'the title to the alternate sections to be taken within the limits, when all the odd sections are granted, becomes fixed, ascertained, and perfected in each case by the location of the line of road, and in case of each road, the title relates back to the act of Congress," citing St. Paul, &c., Railroad *vs.* Winona, &c., Railroad, 112 U. S., 720; M., K. & T. Rail-

way *vs.* K. P. Railway, 97 U. S., 491; Van Wyck *vs.* Knevals, 106 U. S., 360; Cedar Rapids & M. R. R. Co. *vs.* Herring, 110 U. S., 27; Grinnell *vs.* R. R. Co., 103 U. S., 739; but that as to indemnity limits the time when the road becomes vested is different in regard to those that are ascertained within the primary limits by the location of the line of roads; also referring to Ryan *vs.* Railroad Company, 99 U. S., 382, where the court said that the company did not and could not have any claim to it until specially selected, as it was for that purpose, and when a road was located, and the map made, the right to the odd sections first named to be fixed and absolute, but that with respect to the "lieu lands," as they were called, the right was only a float and attached to no specific tracts until the selection was actually made in the manner described; that the same idea was suggested, though not confirmed, in Grimm *vs.* R. R. Co., 103 U. S., 739, and that in Railroad Co. *vs.* Herring, 110 U. S., 27, the principle became the foundation of the judgment of the court rendered at the October term, 1899, and that the same principle had been announced at the term at which the Hewitt case was decided in the case of K. P. R. R. Co. *vs.* A., T. & S. F. Co., 112 U. S., 414; that the reason for this was that as no vested right could attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until they were ascertained and identified by a definite location of the road, so in regard to the lands to be selected within a still larger limit, their identification could not be known until the selection was made.

That the consequence of the difference was that until a valid selection was made within the indemnity limits they were entirely open to disposition by the United States or to appropriation under its laws, and that the only purpose in bounding the indemnity line was to place a boundary upon the right of selection, to repair losses within granted limits, and that this court in the case of the K. C. P. R. R. *vs.* A., T. & S. F. R. R., 112 U. S., 473, and 112 U. S., 414, and in other

cases, had so specifically declared; that in the case last cited the court had said of the order of the Commissioner, so far as applicable to indemnity limits:

"The order of withdrawal of lands along the proper lines of defendant's road by the Commissioner, affected no roads which without it would have been acquired to the land. Nor in any respect controlled the subsequent grants; and that they were to be selected from adjacent lands, if any then remained, to which no other valid claim had originated. But what unappropriated lands would thus be found and selected could not be known before selection. A right to select them within certain limits, was alone conferred; and not a right to any specific land or lands capable of identification. That neither locality nor quantity was given, from which they might be ascertained. And that if, when a selection was to be made, the lands from which the deficiency was to be supplied had been appropriated to other purposes the right of selection became a barren right; for until selection was made the title remained in the Government, subject to its disposal at its pleasure. That it was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby extended to all other lands when surveyed excepting those granted to said company.'"

That if indemnity lands were to be regarded as "on the line of said road," that declaration appeared prohibitory to any withdrawal, and that the prohibitive language was introduced in the same section which declared the granted lands exempt from sale; and immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits, as being liable to disposition under those laws; and that having so explicitly declared, it was not necessary to add a prohibition, because it gave, to any one entitled, the absolute right to acquire the proper quantity, of which no executive officer could deprive him.

That the act made such acquisition as much his right as it made it the right of the company to take the others, and he says, "I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits 'not liable to sale or entry' for the mere purpose of declaring 'what was already enacted by general laws.'" That the general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred, be also made. That the aim of that language was, as he was forced to read it, toward the availability to settlement of all lands not granted.

And then the vastness of the grant and of the threatened evil that it forebode is discussed.

Then the Secretary suggests that the decision in the case of U. S. *vs.* Burlington, etc., R. R. Co., 98 U. S., 334, appears to have fairly set the question at rest in holding that the land was taken "along such lines" in the sense of the statute when taken along the *general direction* within perpendicular lines, and that the same terms were used in the Union Pacific grant, whose lateral limit was twenty miles. That if a section at that distance could be said to be along its line, it was difficult to give another meaning to the language; that it did not require the land to be contiguous, and therefore it was not easy to say at what distance land to be selected would cease to be along the line.

And then the opinion in the Hewitt case proceeds to state that Secretary Smith in the case of N. Pacific R. R. *vs.* Davis, 19 L. D., 87, expresses concurrence in the views of Secretaries Lamar and Vilas, quoting the latter with approval, but adding that Congress in the same section had gone further, and, not content with embodying a withdrawal, had expressly prohibited from making any other withdrawal, when it said in the next clause that the provisions of the pre-emption and homestead laws should be extended to all other

lands excepting those "HEREBY GRANTED TO SAID COMPANY," and that this was an enactment in which the most comprehensive language was used, and that it would seem to follow logically that when it was commanded that the pre-emption and homestead laws should be extended "to all other lands," it was all those lands within the limits of the grant which had not been otherwise disposed of by the act. The "other" lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits.

The opinion in the Hewitt case, after stating that it was admitted upon the argument that the construction of the Northern Pacific act announced by Secretary Vilas had since been adhered to in the Department, and that the court was asked to overthrow it, declared that, without considering the matter as if for the first time presented, it was sufficient to say that the question could not be said to be free from doubt; that the intention of Congress had not been so clearly expressed as to exclude construction or argument in support of the view taken by these Secretaries and upon which the Department has acted since 1888, as it was admitted had been done upon numerous occasions.

To recapitulate:

It is beyond dispute that from 1857, at least until 1888, nearly a third of a century, the uniform construction and practice of the Land Department, sanctioned in all courts and places, had recognized the propriety and efficacy of such withdrawal, not only as to those grants which contained no such restrictive terms as even held to prohibit withdrawals, but likewise as to them, and if, as stated in U. S. *vs.* Ala., &c., R. R., 142, U. S., 615, cited evidently as influential in the opinion in the Hewitt case, the judicial department in case of ambiguity, such as even the imperative and plainly expressed language above quoted, did not suffice to solve, "will lean in favor of a construction given to a statute by the Depart-

ment charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced," and, as stated in the opinion in the Hewitt case, "these observations apply to the case now" (then) "before us," (the court), "and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court for the lapse of so many years in adjudging that it had misconstrued the act in question."

By how much more is the court bound to follow the construction, which in respect of the act now in question, has been uniform and invariable for half a century, not only in the Department, but in all other places.

Analysis of the opinion in Hewitt *vs.* Schultz, and of the cases therein referred to and relied upon, shows that the grounds upon which the court based its decision that the Northern Pacific railroad land grant did not take effect, even as to lands in place, until the maps of definite location had been filed in the office of the Commissioner and approved by him, and that as to indemnity lands it did not take effect until the same had been selected and approved by the Commissioner, were as follows:

1st. The uniform judicial recognition of such limitation.

2d. The logical conclusion resulting from a comparison of the language of the third and sixth sections, where no other construction is reasonably admissible.

3d. The fact that pre-emption and homestead rights were by the same act extended to all lands not thereby granted.

4th. The influence of the opinion of Secretaries Lamar and Vilas that the language of the act extending such pre-emption and homestead rights was not simply declaratory of existing law, but was an essential step in the application of those rights unmistakably to all lands not reserved.

5th. The serious and lasting consequences of establishing or maintaining a wrong precedent in such a matter.

6th. The unmistakeable intent of the particular language used in applying the pre-emption and homestead rights to both even and odd numbered sections and the grant to the former only.

7th. The controlling influence in case of ambiguity, as this was admitted to be, of uniform and long-continued practice of the Land Department, which was specially charged with the administration of the act.

Examination of the act of March 3, 1857, will satisfy any one that none of the reasons for the construction which the Department and the courts have given the Northern Pacific charter and other like acts can be urged against the former, because, first, there has been no uniform judicial recognition of such a limitation as applied to the act of 1857. On the contrary, this is the first time, so far as we know, that any question has been raised as to the general objection and action thereunder which was initiated by Secretary Lamar without attempting to distinguish between one railroad land grant and another. On the contrary, the very action now complained of shows that the usage of the Department has been in accordance with the construction for which we contend.

2. There is no logical or other conclusion to result from a comparison of the language of the third and sixth, or any

other section, because there is no language like that in the Northern Pacific act to be compared or contrasted.

3. There is no deduction to be made from the fact that pre-emption and homestead rights were extended over the lands involved covered by the grant, because nothing of the kind was ever done or attempted in any manner.

4. The influence of the opinion of Secretaries Lamar and Vilas as to the persuasive effect of the language extending such rights does not exist, because there is no such language in the act.

5. The extent of the grant to the State of Minnesota by the act of 1857 is so inconsiderable as compared with the immensity of the Northern Pacific grant as to have no weight in that respect.

6. There is no unmistakable intent in that direction to be derived from the language of the act or any difference in its application to even and odd numbered sections.

7. Even if ambiguity existed, the controlling influence of uniform and long-continued practice of the Department is in support of our contention, because never to our knowledge has a grant in the language of the act of 1857 been construed by the Department or officer thereof whose attention was specially called thereto otherwise than as we contend, while it is beyond dispute that for forty years every such grant has been so construed.

Every reason, therefore, which induced the decision in Hewitt *vs.* Schultz is absent from the present controversy, while many and cogent reasons exist to the contrary.

In Newhall *vs.* Sanger, 92 U. S., 761, it was held that the words "public lands" exclude those which are *sub judice*, and are habitually used in our legislation to describe such as are subject to sale or other disposition in general laws and is not restricted against their *lawful* claims.

In Johanson *vs.* State of Washington, 157 U. S., 320, one claiming to act in behalf of the former Territory selected certain school sections. Thereafter action was commenced against an alleged trespasser upon land thus selected. Upon the argument that authority of the State agent to make the selection was questioned.

The court held that, by the prosecution of the action, the State ratified what he did as agent, and proceeded thus:

"The approval, by the Secretary of the Interior, of a selection by one claiming to be the agent of a Territory or State, of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside. Whether said selection so approved shall afterwards ripen into and fill legal title or not is immaterial so far as the question of withdrawal is concerned. While the land remained subject to such claim and approval, no individual could come in and question its validity. And, further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that, unless Congress clearly designates some other officer to act in respect of such matters, it will be assumed that *he* is the officer to represent the Government."

In Spencer *vs.* McDougal, 159 U. S., 161, this court said:

"An order withdrawing from sale all lands in a certain district is sufficient to defeat a subsequent pre-emption."

In the case of Gonzales *vs.* French, 164 U. S., 338, the plaintiff was in possession of a school section in Arizona when Congress passed an act authorizing the probate judge

of the county to enter in the land office a tract of which parts were in possession of plaintiff, which was all he did. The plaintiff claimed that the passage of the act relieved the land from the school reservation, and that his possession gave him precedence to the entry of the probate judge. This court said:

"Whatever might have been the possessory rights of the plaintiff in error as against other claimants under the ordinary land laws, such rights could not avail against the right of Congress to confer said lands upon other parties (Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77; Shepley *v.* Cowan, 91 U. S., 330). We cannot accede to the argument on behalf of the plaintiff in error that the legal effect of the act of February 13, 1889, was to leave the land described therein open to controversy between townsite settlers and persons who might have settled on the lands, but had not complied with the requisites of the pre-emption laws."

The act construed in Northern Pacific R. R. *vs.* Musser-Sauntry, etc., Co., 168 U. S., 604, was in all respects, except personal details, identical with the act of March 3, 1857. This court construing the former, Mr. Justice Brewer, delivering the opinion of the court, said:

"But a single question is presented in this case, and that is, whether the withdrawal from sale by the Land Department in March, 1866, or of lands within the indemnity limits of the grant of 1856 and 1864, exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed.'"

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw

the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation."

"It is said that the phraseology of the various congressional grants is different and therefore each one must be considered by itself. This, in a general way, may be admitted; but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant."

Referring to the withdrawal, the court further say:

"Evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute title or passage of title to the State or the railway company, for that was contingent upon things thereafter to happen: first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words 'free from pre-emption or other claims or rights.' Certainly after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make public the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim."

While there is a qualification near the end of the opinion to the effect that title to indemnity lands dates from selection and not from the grant, yet there is no modification of the rule that the withdrawal operates to except the lands withdrawn from later disposition.

The following is stated in the case of N. P. Ry. Co. *vs.* Townsend, 190 U. S., 267:

"In respect of the *right of way*, the language of the act of Congress of March 3, 1857, was a present grant, though subject to exceptions expressly stated, in respect to the construction and operation of the road for the purposes designated; consequently, the rights conferred are not to be measured by those given by acts containing limitations and exceptions to which it was in no manner made subject. In U. S. *vs.* Alabama, &c., R. R. Co. 142 U. S., 615, it was declared that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute; and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so *plainly* or *palpably* wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

De Cambra *vs.* Rogers, 189 U. S., 119, was an action to set aside a patent claimed to have been obtained by fraud, and because, as alleged, the Secretary of the Interior did not read the testimony before deciding the appeal. The court say:

"It is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts, and they will not entertain an inquiry as to the extent of investigation by the Secretary or his knowledge of the points decided, or as to the methods by which he reached his determination."

Upon the proposition that the determination of the Department is conclusive so far as the contract of Archbishop Ireland with the railway company was concerned, or of any

other evidential fact that goes to constitute the *ultimate* fact within the meaning of the act of 1887, we beg leave to submit the following additional authorities:

In Silver *vs.* Ladd, 7 Wall., 219, the court, having under consideration the "donation act"—commonly so-called—which perported to grant to every white settler or occupant above the age of 18 years, being a citizen or having declared intention to become such, with certain other qualifications, 320 acres of land if a single man, and 640 it married—half to himself and half to his wife—applied it in favor of a widow, giving the act the liberal construction for which we contend.

In Jeffries, Adm., *vs.* Insurance Co., 110 U. S., 305, the lower court found that there was a contract between the plaintiff's predecessor and certain attorneys for the prosecution of the claim upon a contingent fee, with authority to compromise, and that the plaintiff was bound by this contract made by his predecessor, saying:

"It was contended for the plaintiff in error that the evidence was insufficient to warrant the finding and that there was no contract between the first administrator and Mr. Laurie and Mr. Crews authorizing a compromise; the first administrator had no authority to make such a contract, or to make a compromise, with the sanction of the probate court. That the plaintiff was not bound by the contract made by the first administrator, and that Laurie had no authority to compromise without the co-operation of Crews as to the finding of facts, that there was a contract by the first administrator giving to the attorneys an interest in the proceedings of the claim with authority to compromise, but this court is prohibited, by section 1011 of the Revised Statutes, from reversing the case on a writ of error if any error in facts. In this case there was a dispute as to the facts and evidence on both sides, and it was a fair exercise of the judgment of the court on the evidence before it to make the finding of fact it did. Under such circumstances an erroneous finding of the facts cannot be held to be an error of

law" (Hyde *vs.* Booraem, 16 Pet., 169, 176; Park *vs.* Turner, 12 Howard, 39, 43)."

In the case of Noble *vs.* Mitchell, 164 U. S., 367, the supreme court of Alabama held that the evidence upon which the trial court found that a policy in question was issued by a foreign corporation was sufficient. This court said:

"It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the supreme court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error." (Dower *vs.* Richards, 151 U. S., 659; *In re* Buchanan, 158 U. S., 31).

In Hedrick *vs.* Atchison R. Co., 167 U. S., 673, the trial court found as follows:

"And the court further finds that the plaintiff is not a purchaser of said land in good faith, without notice of the defendant's estate therein, but he is chargeable with full knowledge of all the rights, equities and estate of defendants in and to the said premises, and holds legal title, evidenced by said patent, as trustee for the defendant railroad company's lessor, the Chicago, Santa Fe & California Railway Company, and that plaintiff is not entitled to recover in this action."

In Turner *vs.* People, 168 U. S., 90, this court held that the decision of the court below that a party was not in possession involved no question of law, but was a mere inference of fact from the evidence.

In Nobles *vs.* State of Georgia, 168 U. S., p. 398, the question was whether a so-called "resentence" of a criminal after the first sentence had been superseded was in legal effect but a fixing of a new date for the execution of the previous sentence which had remained constantly in

force. This court held that it was a question of fact and that the decision of the state court thereon could not be re-examined upon a writ of error, saying:

"We take notice of the finding of fact and follow the legal conclusion of the court."

In Stuart *vs.* Hayden, 169 U. S., 1, the question was whether a transfer by a stockholder in a national bank was made in good faith or with intent to escape liability. The trial court held that the latter was the case, saying:

"We will add that as the circuit court and the circuit court of appeals agreed as to what were the ultimate facts established by the elements, this court should accept their view as to the facts, unless it clearly appeared that they erred as to the effect of the evidence."

In San Jose Land and Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177, the act of 1887 is thus referred to:

"The main purpose of this act was to relieve *bona fide* purchasers, from railway companies, of forfeited lands by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. Assuming that Nolan & Heckenlively were *bona fide* purchasers in good faith from the Government, which indeed is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands or ever applied to do so."

In the case of Gardner *vs.* Bonestell, 180 U. S., 352, the 12th finding of fact was "that none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint *purchased* the lands or interest described or mentioned in said deeds *in good faith*," and the 13th was that the evidence introduced in the matter of the application and tests mentioned in the 19th paragraph of said cross-complaint did not show conflict or show at all that all of the facts set forth in the preceding paragraphs of said

cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true. Upon a writ of error to this court the judgment of the court below was affirmed, and the opinion contained the following statement:

"The Land Department found and adjudged not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton WAS NOT A PURCHASER IN GOOD FAITH. BOTH OF THESE FINDINGS WERE MATTERS OF FACT AND BASED UPON TESTIMONY. No proposition of law controlled such findings and no error of law is apparent. * * * The trial court in addition to its findings in reference to the proceedings of the Land Department found as independent matters of fact that the land in controversy was outside the exterior boundaries of the grant and that Throckmorton was not a *bona fide* purchaser.

"The supreme court of the state sustained those findings. Now, in proceedings in this court to review the action of state courts, we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law."

In Hedrick *vs.* Atchison, etc., R. R., which was ejectment, to which defendant answered setting up the facts constituting defendant as trustee for defendant as to the title, the court below found as a fact that the plaintiff was not a purchaser of said land in good faith without notice of defendant's estate therein, but was chargeable with full knowledge of all the rights, equities, and estate of defendants in and to the said premises. The legal conclusion reached by the state courts upon such a state of facts was that the plaintiff was not entitled to recover, and that he held the legal title evidenced by said patent as trustee for the defendants. The determination of the Land Department in a case within its jurisdiction to questions of fact depending upon conflicting testimony is conclusive and cannot be challenged by subsequent proceedings in the courts.

III.

PLAINTIFF IN ERROR SEEKS EQUITY, BUT DOES NOT OFFER TO DO EQUITY.

The grantor of defendant in equity paid $1.25 per acre for the land, and while not asking cancellation, but a decree declaring the latter a trustee, without a suggestion of reimbursement.

The statement of this objection carries all the weight that that authority could possibly give it, and we refrain from so imposing upon the court.

Upon each of these grounds the judgment should be affirmed.

Respectfully submitted.

HIRAM F. STEVENS,
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Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 65.—October Term, 1903.

Jacob Gertgens, Plaintiff in Error, vs. John P. O'Connor. } In error to the Supreme Court of the State of Minnesota.

[November 30, 1903.]

This was an action in ejectment commenced on February 15, 1900, by John P. O'Connor against Jacob Gertgens, in the District Court of the Sixteenth Judicial District of the State of Minnesota, to recover possession of the southwest section 9, township 125, range 45 west. The defendant appeared and answered. A trial was had before the court without a jury, resulting in a judgment for the plaintiff, which was, on April 4, 1902, affirmed by the Supreme Court of the State, (85 Minn. 481,) and thereupon this writ of error was sued out.

The facts are these: The tract was surveyed public land, situate in the county of Traverse, and lying within the twenty-mile indemnity limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, as defined by acts of Congress dated respectively March 3, 1857, (11 Stat. 195,) and March 3, 1865, (13 Stat. 526.) It, with other lands, was withdrawn from settlement and entry under the land laws of the United States by executive withdrawal, dated May 25, 1869. In April, 1885, the tract, being within the indemnity limits, was, with other tracts, selected by the railway company as indemnity for deficiencies claimed to exist within the place limits. These selections were all finally cancelled on October 23, 1896.

Prior to April 15, 1891, the land was unoccupied, but at that time the defendant, being fully qualified as a homestead claimant, took possession with a view of claiming it as a homestead under the laws of the United States, has ever since occupied it as his homestead and made improvements thereon of the value of $1,200. He made application at the local land office for a homestead entry but it was refused by the local land officials, and such refusal sustained on appeal by the Commissioner of the General Land Office. The refusal was on the ground that the land was within the twenty-mile indemnity limits of the railway company, and had been selected by the company in 1885, long before the defendant went upon land.

In July, 1880, the railway company entered into a written agreement with the Rev. John Ireland, a citizen of the United States, by which the company gave him the sole and exclusive right and authority to place settlers upon and sell to them all the lands in the counties of Big Stone and Traverse, to which the railway company might be entitled by virtue of the land grants of March 3, 1857, and March 3, 1865, and which

were included within the indemnity limits of said grants. This contract expired December 31, 1881. On March 30, 1883, the railway company made a new agreement, which, after referring to the prior contract, contained this stipulation:

"Now, therefore, the contract herein referred to having expired on the 31st day of December, A. D. 1881, and the R. R. Co. not yet having acquired title to the lands in question, it is now agreed between the R. R. Co., and the Rev. John Ireland that when title to these lands are acquired by the R. R. Co., and notice of the same is given to Rev. John Ireland, he shall have the privilege and the right at any time within sixty days of date of said notice of purchasing for himself or such parties as he may designate, due regard being had, as stated in supplement to said contract for settlers who may have obtained any claim upon such lands previous to the date of said contract, any or all of the lands included in said contract, not to exceed the amount of 50,000 acres at uniform price of four dollars per acre, ten per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland according as the monies are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate, the conditions of sale usual with the company shall be observed or at least the interest upon the purchase money shall be paid from the date of purchase to the fifteenth day of December following, when the usual condition shall be enforced."

This agreement was duly recorded in the office of the register of deeds of Traverse County, Minnesota. On February 8, 1896, Ireland made application to the Land Department for leave to purchase from the government the land in controversy under the provisions of the fifth section of the act of Congress of March 3, 1887. (24 Stat. 556.) This application was contested by the defendant, but the claim of Ireland was sustained by all the officials of the Land Department, from the local officers up to the Secretary of the Interior. A patent was thereupon issued to Ireland, from whom the plaintiff obtained a conveyance. The act of March 3, 1887, was an act directing the Secretary of the Interior to adjust, in accordance with the decisions of the Supreme Court, the several railroad land grants made by Congress. Section 5, under which Ireland made his claim, is copied in the margin.*

Mr. Justice BREWER delivered the opinion of the Court.

The patent was issued to Ireland after a contest between him and the defendant, in which the several officials of the Land Department, from the

*SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the

local officers to the Secretary of the Interior, sustained his contention. The decisions of the Land Department in such contest cases are conclusive upon all questions of fact. (*Burfenning* v. *Chicago &c. Railway*, 163 U. S. 321, 323, and cases cited; *Johnson* v. *Drew*, 171 U. S. 93, 99; *Gardner* v. *Bonestell*, 180 U. S. 362; *De Cambra* v. *Rogers*, 189 U. S. 119.) The patent passed the legal title to Ireland. It devolved upon the defendant, contesting that title, to show a superior right, legal or equitable, to the land. Both the trial and Supreme Courts of the State decided against the defendant's claim. We have thus the unanimous conclusions of all the officers of the Land Department of the United States and of the judges of the courts of the State, to whom the question could be presented, in favor of plaintiff's title.

In respect to certain requirements of section 5, under which the Land Department acted there is no question. Ireland was a citizen of the United States. The tract was within the contract made by the company with him in 1883. It had never been conveyed to the company, or for its use. It was an odd-numbered section, within the limits of the grant, and coterminous with a constructed part of the road. It was excepted from the operation of the grant because of a defect in the selection of indemnity lands. All these matters being beyond dispute, there remain open the questions whether the land could be deemed to have been sold by the company to Ireland, and whether he was a *bona fide* purchaser; and, further, conceding that Ireland comes within the provisions of the section, whether the equitable rights of the defendant as a homestead settler are superior.

Was there a sale, and was Ireland a *bona fide* purchaser within the scope of said section? It is contended on the one hand that these are questions of fact concluded by the decisions of the Land Department, and on the other that it is the duty of the court to construe a written instrument, and as the agreement between the company and Ireland was in

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bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

writing it is a question of law and not of fact whether there was a sale by the company and a purchase by Ireland. Doubtless, whether a transaction evidenced by a written agreement was a real transaction or a sham, whether it was executed with a fraudulent intent or in good faith, may present questions of fact, and in so far as those questions are involved in this case the conclusions of the Land Department are final. We must accept the agreement between the company and Ireland as genuine, made in good faith, and supported, so far as it can be, by all outside facts, such as a sufficient consideration.

It is, however, earnestly contended that there was no sale or purchase; that the company gave only a mere option, which, though binding on it, cast no obligations on Ireland. If he wanted to complete the contract and pay for the land, he might do so. If he did not, he was under no liability to the company. Strictly speaking, this contention is correct. Ireland had made no payment for this land, had made no absolute promise to pay, and it was optional with him whether he took the land or not. And if it be a condition of acquiring a right under this section, that the party claiming must either have paid or promised to pay, then Ireland was not entitled to any benefit therefrom. But we think the section does not compel such construction. We have more than once held that the entire statute was remedial in its nature and must be construed so as to carry out the intent of Congress and secure to the parties the intended relief. Primarily, the purpose was to secure an adjustment of the various land grants in aid of railroads. Much confusion had existed in the construction and administration of those grants. There had been conflicting decisions, and Congress attempted, without displacing vested rights, to do equity to all parties claiming interests in lands within these various grants. It did not purpose to merely define legal rights or prescribe new methods for their enforcement. The courts were competent under the law, as it stood, without additional legislation to preserve such rights.

There were three parties whose interests and equities were to be regarded: First, the railway company, the beneficiary of the grant; second, parties who had dealt with the railway company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States. With reference to the railway company, it is sufficient to say that Congress aimed to limit its acquisition of title to the amount of land which it had in fact earned by the construction of the road, and prescribed that the adjustment with it should be made in accordance with the rulings of this court; authorized actions to recover any lands improperly conveyed to the company, or, if the company had parted with them, the value thereof in money.

As to those who had dealt with the railway company, its evident purpose was to secure to them the lands they had contracted for, in so far as

it could be done without trespassing on the rights of settlers. The scope of section 5 is disclosed by its opening words, "where any said company shall have sold." In case of a sale, certain privileges are given upon certain conditions. Nowhere does it provide as one of those conditions that the company shall have received full, or indeed any, payment. If there is a sale it is sufficient. Why in a remedial statute may not the word include a sale upon conditions, one in which the proposed buyer has an election to accept the company's promise? The section does not attempt to relieve any one whose transactions with the railway company were not in good faith. The term "*bona fide* purchaser" is used in the statute; but, as we pointed out in *United States* v. *Winona &c. Railroad*, (165 U. S. 463, 480, 481,) not in any technical sense, but simply as demanding good faith in the transactions between the individual and the company. It is true that the parties who, in that case, had dealt with the company had in fact purchased and paid value, and it was unnecessary to consider anything more than the effect of such transactions. But still it was distinctly held that the term "*bona fide* purchaser" was not intended in any technical sense, but only as one implying good faith.

In reference to Ireland's actions under his contracts with the company, the Supreme Court of the State said (p. 488):

"Under his first contract with the railroad company, Ireland expended large sums of money and devoted a great deal of time to a colonization enterprise, and the expenditure and labor was kept up until 1883; large numbers of people being thereby induced to settle in a new country tributary to the line of road belonging to the company.

"By it the company constituted Ireland its mere agent to make sales of the land therein scheduled, to receive payment thereon and to bind it to convey when its title should be perfected or to return the money paid, in case it failed to obtain title.

"The agreement of March 30 was wholly different. The agency was at an end. Ireland was given the right to purchase for himself and for others 50,000 acres at a stipulated price per acre, and upon certain terms. The company could not then convey, and when it could was uncertain, and it was agreed that purchasers should not be obliged to pay any part of the purchase price until it was within the power of the company to give good title. This was the construction placed upon the contract by the parties thereto, and it was the rational and proper one. Ireland proceeded under this contract, as he had under the first, to secure purchasers for these lands. They became actual residents and received contracts for conveyances. He expended much time and large sums of money in the scheme to populate the country in question, and his success was very noticeable."

It is not pretended that what he did under these contracts, including therein his outlays of time and money, were under his last agreement to be accepted by the company as so much payment for the land, but these facts are stated to show the *bona fides* of the transaction; that it was not

an attempt by means of a mere option to facilitate the acquisition of title from the government to the injury of *bona fide* settlers. On the contrary, Ireland was seeking to bring settlers on these lands, and thus aiding in carrying out the general purpose of the government to transform the vacant public lands into homes. Surely a purpose so in harmony with that of the government and an effort in the way that he pursued to carry that purpose into effect makes a case appealing to the favorable consideration of Congress, and is in its nature essentially different from a pure speculation in public lands at the expense of *bona fide* settlers. The rulings of the Land Department have been along the line of a recognition of the fact that attempts in good faith by a party to obtain from a railroad company for *bona fide* settlements lands believed to belong to it or expected to be acquired by it, present cases which were intended to be included within the act of 1887, and entitled to its protection. (*In re Campbell*, 12 L. D. 247; *Telford* v. *Keystone Lumber Company*, 18 L. D. 176; 19 L. D. 141; *Holton* v. *Rutledge*, 20 L. D. 227; *Austin* v. *Luey*, 21 L. D. 507.)

It must be borne in mind that the purpose of section 5 was not relief to the company, but to one dealing with it. Ireland by his contract had obtained rights from the company even if he had not assumed obligations to it. The land was the property of the government, and property to which the company acquired no title, but being within the limits of its grant it had claimed a right and contracted with Ireland as though it had or would receive the title. Section 5 gave to Ireland only a right to purchase this land from the government—a preferential right—paying to the government its price, no portion of which was to pass to the railway company, and gave him that preferential right because of his dealings with the company. He had sought to obtain title to this land from the company. He had made a contract by which, if the company acquired title, he could obtain that title; and Congress, by section 5, simply provided that, having so acted in respect to this land, he should have a preferential right of purchase. The company neither gains nor loses. The government receives its price for the land, and is, therefore, fully protected, and Ireland receives that, in respect to which he certainly has some equitable claim of consideration, a preferential right of purchase.

The third party is the settler under the land laws, and we pass to consider his status and rights. A settler is, as has often been said, favored in law, but it does not follow therefrom that he is the only one whose equities are to be considered. Congress, by section 5, made provision for his protection—such provision as it deemed sufficient. While it gave to purchasers from the railway company a preferential right of purchase it excepted therefrom lands which at the times of such purchase "were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation

have not since been voluntarily abandoned." In other words, it said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his dealings with the railway company were in the hands of a *bona fide* settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland's contract, nor, indeed, until many years thereafter. Neither did he come under the protection of the second proviso, for, although his settlement was after December 1, 1882, it was not until long after the passage of the act.

It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been cancelled. Ireland's contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company's grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide* settler. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation.

We think the judgment of the Supreme Court of Minnesota was right, and it is

Affirmed.